No. 18-459	
Title:	**Emulex Corporation, et al., Petitioners** **v.** **Gary Varjabedian, et al.**
Docketed:	October 11, 2018
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(16-55088)
Decision Date:	April 20, 2018
Rehearing Denied:	September 6, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Oct 11 2018	Petition for a writ of certiorari filed. (Response due November 13, 2018) **Petition** **Certificate of Word Count** **Proof of Service**
Oct 16 2018	Motion to extend the time to file a response from November 13, 2018 to November 30, 2018, submitted to The Clerk. **Main Document**
Oct 18 2018	Motion to extend the time to file a response is granted and the time is extended to and including November 30, 2018.
Nov 13 2018	Brief amicus curiae of Securities Industry and Financial Markets Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 13 2018	Brief amicus curiae of Chamber of Commerce of the United States of America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 30 2018	Brief of respondents Gary Varjabedian, et al. in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 18 2018	Reply of petitioners Emulex Corporation, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 19 2018	DISTRIBUTED for Conference of 1/4/2019.
Jan 04 2019	Petition GRANTED.
Feb 06 2019	Blanket Consent filed by Respondents, Gary Varjabedian, et al.

	Blanket Consent
Feb 11 2019	SET FOR ARGUMENT on Monday, April 15, 2019
Feb 19 2019	Joint appendix (2 volumes) filed. (Statement of costs filed) **Main Document** **Main Document** **Proof of Service**
Feb 19 2019	Brief of petitioners Emulex Corporation, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 25 2019	Brief amici curiae of Former Commissioners of the Securities and Exchange Commission filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 26 2019	Brief amici curiae of Chamber of Commerce of the United States of America and Business Roundtable filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 26 2019	Brief amicus curiae of Securities Industry and Financial Markets Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 26 2019	Brief amicus curiae of United States in support of neither party filed. **Proof of Service** **Main Document**
Feb 26 2019	Brief amicus curiae of Washington Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 26 2019	Brief amicus curiae of Phillip Goldstein filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 20 2019	CIRCULATED
Mar 21 2019	Record requested from the U.S.C.A. 9th Circuit.
Mar 21 2019	Brief of respondents Gary Varjabedian, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 22 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Mar 28 2019	Brief amicus curiae of North American Securities Administrators Association, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 28 2019	Brief amici curiae of Institutional Investors filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Mar 28 2019	Brief amici curiae of Legal Scholars filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 01 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 08 2019	Reply of petitioners Emulex Corporation, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 15 2019	Argued. For petitioners: Gregory G. Garre, Bethesda, Md. For United States, as amicus curiae: Morgan L. Ratner, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Daniel L. Geyser, Dallas, Tex.
Apr 23 2019	Writ of certiorari DISMISSED as improvidently granted. **Opinion** per curiam.
May 28 2019	JUDGMENT ISSUED.

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No. _____

In the
Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held, in express disagreement with five other courts of appeals, that Section 14(e) of the Securities Exchange Act of 1934 supports an inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer.

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, who were defendants in the United States District Court for the Central District of California and appellees in the United States Court of Appeals for the Ninth Circuit, are Emulex Corporation; Bruce C. Edwards, Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari, and Dean A. Yoost, individual members of Emulex's board of directors; Emerald Merger Sub, Inc.; and Avago Technologies Wireless (USA) Manufacturing Inc.

Respondents are Gary Varjabedian and Jerry Mutza. Although Varjabedian, who is listed as plaintiff-appellant in the caption for the decision below, filed the initial complaint, the district court appointed Mutza as lead plaintiff. Both Mutza and Varjabedian represent the same putative class of former Emulex shareholders. App. 1a n.1.

RULE 29.6 STATEMENT

Petitioner Avago Technologies Wireless (USA) Manufacturing Inc. is now known as Avago Technologies Wireless (USA) Manufacturing LLC, following a corporate restructuring that occurred on June 26, 2017. Avago Technologies Wireless (USA) Manufacturing LLC is a wholly owned subsidiary of Broadcom Corporation, a California corporation, which is wholly owned by Broadcom Pte. Ltd., a Singapore entity, which is wholly owned by Broadcom Technologies Inc., a Delaware corporation, which is wholly owned by Broadcom Inc., a Delaware corporation. No publicly held company owns 10% or more of the stock of Broadcom Inc.

Petitioner Emulex Corporation, a Delaware corporation, was merged with and into its subsidiary, Emulex Corporation, a California corporation, and ceased to exist as a corporate entity on November 17, 2016. Emulex Corporation, a California corporation, is a wholly owned subsidiary of Avago Technologies Wireless (USA) Manufacturing LLC and thereby a wholly owned indirect subsidiary of Broadcom Inc.

As a result of the transaction at issue in this case, Petitioner Emerald Merger Sub, Inc., ceased to exist as a corporate entity on May 5, 2015 when it merged into Emulex Corporation, a Delaware corporation. Before then, it was a wholly owned subsidiary of Avago Technologies Wireless (USA) Manufacturing Inc.

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Cornerstone Research, *Securities Class Action Filings—2017 Year In Review* (2018), http://bit.ly/Cornerstone2017YIR 23, 25

Alison Frankel, *Bucking precedent, 9th Circuit opens door to more M&A challenges*, Reuters (Apr. 23, 2018), http://bit.ly/VarjabedianBucking Precedent 11, 24

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Petitioners Emulex Corporation (Emulex), Bruce C. Edwards, Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari, Dean A. Yoost, Avago Technologies Wireless (USA) Manufacturing Inc., and Emerald Merger Sub, Inc., respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a-26a) is reported at 888 F.3d 399. The district court's order dismissing the complaint with prejudice (App. 27a-57a) is reported at 152 F. Supp. 3d 1226. The order of the court of appeals denying rehearing (App. 58a-59a) is unreported.

JURISDICTION

The court of appeals entered its opinion on April 20, 2018. App 1a. On September 6, 2018, the court of appeals denied a timely petition for rehearing. *Id.* at 58a-59a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage

> in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The [Securities and Exchange] Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Other pertinent statutory and regulation provisions are reprinted at App. 62a-65a.

STATEMENT

This case presents an acknowledged circuit conflict concerning an undeniably important question arising under the Securities Exchange Act of 1934 (Exchange Act or Act): Whether Section 14(e) of the Exchange Act supplies an inferred private cause of action based on mere negligence, not scienter.

Section 14(e) proscribes false statements and material omissions made in connection with a tender offer. Five different circuits, in an unbroken line of decisions dating back nearly half a century, have held that mere negligence is insufficient to establish a claim for relief under Section 14(e), just as with Section 10(b) of the Exchange Act and its better known component, Rule 10b-5. In the decision below, the Ninth Circuit expressly acknowledged that authority, then "part[ed] ways" with it—holding that a private plaintiff seeking relief under Section 14(e) need only plead and prove negligence. App. 20a. Applying its new negligence standard, the court

reversed the district court's decision dismissing plaintiff's complaint under the scienter standard that has governed Section 14(e) claims for nearly 50 years.

An acknowledged circuit conflict on a matter of such undeniable importance is a sufficient reason by itself to grant certiorari. This Court has frequently intervened to resolve conflicts over the meaning of the federal securities laws, in part because the flexible venue rules applicable to such suits mean that the outlier position of one circuit can become a de facto national standard simply through forum shopping. Plaintiffs' lawyers already file a disproportionately large number of securities class actions in the Ninth Circuit, and the Ninth Circuit's creation here of a negligence-based claim for damages and other remedies that had been rejected in other circuits for decades will only make it more of a magnet for such actions. *See infra* at 23-24. After all, given the choice, why would a plaintiff desiring to assert a private claim under Section 14(e)—along with, as here, a demand for damages—ever file anywhere else?

But the Ninth Circuit's decision is also wrong. The text of Section 14(e), as well as its roots in Section 10(b) of the Exchange Act and Rule 10b-5, confirm its *antifraud* focus—as other circuits have recognized. Moreover, the Ninth Circuit simply ignored the fact that Section 14(e) contains no express private right of action at all. To the extent a private right of action may be inferred from silence (*cf. Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)), the contours of that right cannot disrupt the balance Congress struck in the statute's express provisions—here, a balance between protecting investors against fraud, on the one hand, and overly encumbering the markets with judicial second-guessing, on the other. The

Ninth Circuit's unprecedented embrace of an inferred private right of action under Section 14(e) for merely negligent conduct destroys that balance, and erects a civil liability scheme whose "consequences"—as Judge Friendly observed in analogous circumstances—are "frightening." *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 866-67 (2d Cir. 1968) (concurring), *cert. denied*, 394 U.S. 976 (1969).

The petition should be granted.

A. Background

In the wake of the stock market crash that caused the Great Depression, Congress passed two major laws designed to protect the securities markets. The first, the Securities Act of 1933 (1933 Act), regulates the disclosures made in connection with the initial distribution and purchase of securities. The second, the Exchange Act of 1934, regulates subsequent transactions involving securities, including sales on securities exchanges, proxy offers, and tender offers. *See* App. 7a-8a; *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-95 (1976).

Section 10 of the 1934 Act makes it "unlawful for any person . . . (b) [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j. In 1942, acting pursuant to authority delegated to it by the 1934 Act, the SEC promulgated Rule 10b-5, which prohibits the use of manipulative and deceptive practices in connection with purchase or sale of any security. 17 C.F.R. § 240.10b-5. This Court has held both that Section 10(b) confers an implied private right of action, and that a plaintiff bringing such an

action must plead and prove scienter—*i.e.*, a knowing or reckless violation of the 1934 Act. *See Ernst & Ernst*, 425 U.S. at 196-97, 199. Based on its review of the statute and its history, the Court, however, has been "quite unwilling to extend the scope of the statute to negligent conduct." *Id.* at 214.

Section 14(e) of the Exchange Act, which was enacted as part of a series of amendments made to the Act in 1968, requires the disclosure of certain information in connection with tender offers. The first sentence of Section 14(e) was—as this Court has observed—"modeled on the antifraud provisions of § 10(b) of the Act and Rule 10b-5," *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10 (1985), and "prohibits fraudulent acts in connection with a tender offer," *United States v. O'Hagan*, 521 U.S. 642, 667 (1997); *see supra* at 1-2 (reproducing Section 14(e)). The second sentence directs the SEC to promulgate such rules as are "reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. § 78n(e).

In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 24 (1977), this Court recognized that "Section 14(e) . . . makes no provision whatever for a private cause of action, such as those explicitly provided in other sections of the 1933 and 1934 Acts." Applying the factors set out in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the Court declined to infer a private cause of action for damages under Section 14(e) for unsuccessful tender offerors. 430 U.S. at 41-42. The Court has not considered whether such a right of action may be inferred under this Court's precedents for the shareholders subject to a tender offer. But lower courts, including the Ninth Circuit, have

inferred such a cause of action. *See, e.g., Plaine v. McCabe*, 797 F.2d 713, 717-18 (9th Cir. 1986).

In 1995, Congress enacted the Private Securities Litigation Reform Act (PSLRA) as a check against abusive federal securities litigation by private parties. Among other things, the PSLRA imposes heightened pleading requirements on plaintiffs in federal securities actions, including with respect to scienter. Section 21D(b)(2) of the PSLRA provides that plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). The Act thus "unequivocally raise[d] the bar for pleading scienter" when required. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313, 321 (2007) (alteration in original) (citation omitted).

B. Facts And Procedural History

1. This case arises from the merger of two technology companies—Emulex and Avago Technologies Wireless (USA) Manufacturing Inc. (Avago) in 2015. App. 29a. Emulex produced equipment for data centers, including network interface cards, server management chips, switches and routers, and connectivity management software. Avago, in turn, was a leading designer, developer, and supplier of analog semiconductor devices. On February 25, 2015, Emulex and Avago jointly announced that they had agreed to merge by way of an accepted tender offer. Under the terms of the agreed upon tender offer, a subsidiary of Avago, Emerald Merger Sub, Inc., offered, on April 7, 2015, to pay $8.00 for every share of outstanding Emulex stock. The $8.00 price reflected a 26.4% premium on

Emulex's stock price the day before the merger was announced.

On the same day that the tender offer was initiated, Emulex filed a 48-page Recommendation Statement with the SEC on Schedule 14D-9 (*see* 17 C.F.R. § 240.14d-101). App. 30a. The Recommendation Statement listed nine separate reasons for approving the merger, including that Emulex shareholders would receive a premium on their stock. *Id.* The Recommendation Statement also provided a five-page summary of a "fairness opinion" that Emulex had received from its financial advisor, Goldman Sachs, which found that the $8.00 offer price was fair to shareholders. *Id.* at 30a-31a.

2. The day after Emulex filed its Recommendation Statement with the SEC, Gary Varjabedian, an Emulex shareholder, filed a putative federal securities class action in the U.S. District Court for the Central District of California on behalf of himself and other shareholders, seeking to enjoin the merger.[1] To avoid a costly discovery dispute, Emulex voluntarily provided plaintiff with the core documents, including the so-called "Board Book," that Goldman Sachs had compiled in undertaking its fairness analysis of the tender offer. The last page of the Board Book contained a chart, entitled "Selected Semiconductor Transactions," which listed, based on publicly available information, the premiums

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[1] The district court eventually appointed Jerry Mutza as lead plaintiff, though it kept Varjabedian in the caption. App. 1a n.1. As the Ninth Circuit explained, "[t]here is no material difference between Mutza and Varjabedian for purposes of this appeal, as they both represent the same class of Emulex shareholders and are represented by the same counsel." *Id.*

received in 17 transactions involving semiconductor companies between 2010-2014. App. 31a.

The one-page chart, also known as the "Premium Analysis," *id.*, did not contain any qualitative assessment of the transactions listed, and did not compare the transactions with Avago's tender offer. It simply showed that the 26.4% premium on the share price under Avago's tender offer for Emulex was within the range of transaction premiums identified in these unrelated semiconductor transactions (even if, as plaintiff stresses, it was below the mean and median of these premiums). *Id.* at 31a, 39a.

After receiving this information (and having failed to secure an order enjoining the merger), plaintiff amended his complaint to allege that, by failing to include the Selected Semiconductor Transactions chart in the Recommendation Statement, Emulex and the other petitioners (the companies involved in the transaction and individual directors of Emulex) violated Section 14(e) of the Exchange Act. According to plaintiff, the omission of the chart "create[d] the materially misleading impression that the premium Emulex's shareholders received was significant, or at the very least in line with premiums obtained in similar transactions." First Am. Compl. ¶ 8 (C.D. Cal. Sept. 17, 2015), ECF No. 29.

The amended complaint sought damages as well as an order rescinding the transaction. *Id.* at 46.

3. The district court dismissed the amended complaint with prejudice. Drawing from the "wealth of persuasive case law" holding that Section 14(e) requires a showing of scienter, the court rejected plaintiff's argument that "only negligence" is required. App. 36a, 35a. As the court explained, "*no*

federal court has held that § 14(e) requires only a showing of negligence," and "the better view is that the similarities between Rule 10b-5 and § 14(e) require a plaintiff bringing a cause of action under § 14(e) to allege scienter," *i.e.*, that "'defendants made false or misleading statements either intentionally or with deliberate recklessness.'" *Id.* (citation omitted). The court added that the PSLRA further requires plaintiffs to "plead facts evincing a *strong inference* of scienter." *Id.* at 36a-37a (citation omitted).

Applying that standard, the district court held that the amended complaint failed to state a claim. First, the court found that nothing in the Selected Semiconductor Transactions chart contradicted the Recommendation Statement; indeed, the chart simply "report[ed] that the Emulex premium was below-average for the industry but within a reasonable range of outcomes." *Id.* at 40a. Second, the court found that there was a "better explanation" than fraud for defendants' decision not to include the chart—it was "minor in the scheme of the voluminous analysis performed by Goldman Sachs," and its substance was "unremarkable." *Id.* at 45a. Accordingly, the court held that plaintiff's allegations, even if accepted as true, failed to establish a "strong inference of scienter." *Id.* at 46a-47a.

4. The Ninth Circuit reversed in a published opinion. The court focused on the legal question whether Section 14(e) requires "proof of scienter, as the district court held, or mere negligence." *Id.* at 8a. It recognized that the district court's conclusion was in line with the case law in "five other circuits"—the Second, Third, Fifth, Sixth, and Eleventh Circuits. *Id.* at 9a. But the court chose to "part[] ways from [its] colleagues in [those] five other circuits," *id.* at 20a,

and held that Section 14(e) requires a showing of "only negligence, not scienter," *id.* at 16a.

According to the Ninth Circuit, these other circuits had erred in focusing on "the shared text found in both Rule 10b-5 and Section 14(e)" reflecting an antifraud focus. *Id.* at 9a. In so reasoning, the court relied on statements in this Court's decisions in *Ernst & Ernst*, holding that an inferred private right of action under Section 10(b) of the Exchange Act and Rule 10b-5 requires scienter, and *Aaron v. SEC*, 446 U.S. 680 (1980), holding that the express right of action for the SEC to seek injunctive relief under Section 17(a)(2) of the Exchange Act does reach negligent conduct. App. 11a-12a. The Ninth Circuit acknowledged that "circuit courts have continued" to hold that Section 14(e) requires scienter in the wake of *Aaron* and *Ernst & Ernst*, but it faulted those courts for doing so. *Id.* at 13a-15a.

The Ninth Circuit remanded for the district court to "reconsider Defendant's motion to dismiss under a negligence standard." *Id.* at 20a.[2]

---

[2] Plaintiff also brought claims under Section 14(d)(4) and Section 20(a) of the Exchange Act. The district court held that the former claim should be dismissed on the ground that Section 14(d)(4) does not create a private right of action. App. 55a. The Ninth Circuit affirmed that ruling (*id.* at 18a-19a) and it is not at issue here. The parties agree that plaintiff's Section 20(a) claim, which seeks to hold the individual directors of Emulex liable for any federal securities violation as "controlling persons," rises or falls with his Section 14(e) claim. *Id.* at 6a & n.2, 19a. Accordingly, if this Court grants certiorari and reverses the Ninth Circuit's handling of plaintiff's Section 14(e) claim, then plaintiff's Section 20(a) claim will fall as well.

5. The Ninth Circuit denied Emulex's timely petition for rehearing, but stayed issuance of the mandate to allow Emulex to seek certiorari.

REASONS FOR GRANTING THE WRIT

This case meets all the conventional requirements for certiorari. *See* Supreme Court Rule 10(a). By its own admission, the Ninth Circuit "part[ed] ways" in this case from the approach taken by other circuits on the question whether an inferred private right of action under Section 14(e) of the Exchange Act requires proof of scienter, as opposed to mere negligence. App. 20a. That question is undeniably important. And the Ninth Circuit's unprecedented position that a plaintiff is entitled to a private remedy under Section 14(e) based on a showing of just negligence is at odds with the text, structure, and history of Section 14(e)—which explains why no court has ever previously interpreted Section 14(e) to impose merely a negligence standard.

A. The Decision Below Conflicts With The Decisions Of Five Other Circuits

The petition presents a square circuit split. The Ninth Circuit expressly rejected the view of all five circuits that had previously considered—and rejected—a negligence-based standard under Section 14(e). *See* App. 20a; *see also In re Tangoe, Inc. Stockholders Litig.*, --- F. Supp. 3d ---, 2018 WL 3651334, at *23 (D. Conn. July 31, 2018) (recognizing conflict over whether a plaintiff must "plead[] scienter for claims under Section 14(e)"). And commentators have recognized the split as well. *See, e.g.*, Alison Frankel, *Bucking precedent, 9th Circuit opens door to more M&A challenges*, Reuters (Apr. 23, 2018),

http://bit.ly/VarjabedianBuckingPrecedent; John P. Stigi III & John M. Landry, *Ninth Circuit Splits From Other Circuits, Holding That A Negligence Standard Applies To A Claim Challenging Tender Offer Disclosures Under Section 14(e)*, The National Law Review (Apr. 26, 2018), http://bit.ly/VarjabedianNLJ.

1. As the Ninth Circuit explained, five other courts of appeals have considered whether Section 14(e) supports a claim based on a showing of mere negligence, not scienter. *See* App. 20a. And in an unbroken line of decisions going back nearly half a century, each of those circuits has squarely held that the answer was "no." *See id.* at 10a-15a.

The first such decision came in 1973, just five years after passage of Section 14(e). In *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, the Second Circuit noted that "the underlying proscription of § 14(e) is virtually identical to . . . Rule 10b-5," with the "critical difference" being that Section 14(e) applies to tender offers. 480 F.2d 341, 362 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973). The court thus decided to "follow the principles developed under Rule 10b-5 regarding the elements of such violations," including the rule that "mere[ly] negligent conduct" does not contravene the law. *Id.* at 362-63. The Second Circuit has adhered to that principle ever since, holding that "[i]t is well settled in this Circuit that scienter is a necessary element of a claim for damages under § 14(e)." *Connecticut Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 961 (2d Cir. 1987).

The Fifth Circuit soon followed suit. In *Smallwood v. Pearl Brewing Co.*, it noted that "liability in a private action for damages has apparently never been imposed for negligent conduct under . . . Rule [10b-5]." 489 F.2d 579, 606 (5th Cir.

1974). Concluding that "the elements to be proved to establish a violation of Section 14(e) are identical to those under the Rule," it held that "some culpability, beyond mere negligence, is required" to state a claim for damages under Section 14(e). *Id.* The Fifth Circuit has adhered to that requirement. *See, e.g., Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009) ("The elements of a claim under Section 14(e) . . . are identical to the Section 10(b)/Rule 10b-5 elements," including the need to identify a material false statement or omission "made with scienter.").

The Sixth Circuit adopted the same rule. In *Adams v. Standard Knitting Mills, Inc.*, it concluded that "[t]he language of the Williams Act clearly demonstrates that Congress envisioned scienter to be an element of 14(e)." 623 F.2d 422, 431 (6th Cir.), *cert. denied*, 449 U.S. 1067 (1980). In construing Section 14, the Sixth Circuit also recognized that, in defining the scope of an inferred private right of action, courts "have a special responsibility to consider the consequences of their rulings and to mold liability fairly to reflect the circumstances of the parties." *Id.* at 428. Those considerations, the court explained, also weighed against a bare negligence standard. *Id.*

The Third Circuit reached the same conclusion in 2004. In *In re Digital Island Securities Litigation*, it recognized that "Section 14(e) is 'modeled on the antifraud provisions of § 10(b) of the ['34] Act and Rule 10b-5,' which require proof of scienter." 357 F.3d 322, 328 (3d Cir. 2004) (alteration in original) (quoting *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10 (1985); and citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976))). Noting that the "similarity in the language and scope of Section 14(e) and Rule 10b-

5" warrants "construe[ing] the two consistently," it "join[ed] those circuits that hold that scienter is an element of a Section 14(e) claim." *Id.*

And the Eleventh Circuit joined these circuits in *SEC v. Ginsburg*, holding that "to establish liability under . . . § 14(e) of the Securities and Exchange Act . . . , the SEC must prove that [the defendant] acted with scienter, 'a mental state embracing intent to deceive, manipulate, or defraud.'" 362 F.3d 1292, 1297 (11th Cir. 2004) (quoting *SEC v. Adler*, 137 F.3d 1325, 1340 (11th Cir. 1998)).

2. For the first fifty years of Section 14(e)'s existence, therefore, there was uniform recognition in circuits across the country that Section 14(e) does not support a private right of action or remedy based on mere negligence. As the district court here explained, "*no* federal court ha[d] held that § 14(e) requires only a showing a negligence." App. 36a.

In the decision below, the Ninth Circuit blew up that consensus. It recognized these "out-of-circuit authorities." App. 2a; *see id.* at 9a (citing cases). But it was "persuaded that the rationale underpinning those decisions" was incorrect. *Id.* at 9a. Instead, pointing to Supreme Court cases decided in 1976 (*Ernst & Ernst*) and 1980 (*Aaron*) that addressed other provisions of the securities laws, the Ninth Circuit concluded that every judge to have ever addressed the question of Section 14(e)'s scienter standard had gotten it wrong. For that reason, and that reason alone, it reversed the district court's decision that had disposed of the case in favor of petitioners. *See id.* at 20a ("[W]e REVERSE the district court's decision as to the Section 14(e) claim because the district court employed a scienter standard in analyzing the Section 14(e) claim.").

As discussed above, the Ninth Circuit fully appreciated that it was creating an expansive new regime at odds with the uniform view in the rest of the country. It recognized that, "[d]espite the Supreme Court's decisions in *Ernst & Ernst* and *Aaron*, circuit courts have continued to" reject a negligence standard in the 38 years since *Aaron* was decided. *Id.* at 13a-14a. But it believed that all these courts got it wrong and that, in fact, Section 14(e) should be interpreted to confer a much broader private cause of action—one for mere negligence—and it embraced that dispositive "holding" even though it meant "part[ing] ways from our colleagues in five other circuits." *Id.* at 20a.

In short, the circuit split here is as square, obvious, and consequential as they come.

B. The Decision Below Is Incorrect

Upsetting a half-century of circuit case law from across the country on an undeniably important issue is reason enough to grant review. But here, there is another reason: the Ninth Circuit's decision also upsets the statutory scheme enacted by Congress.

1. "The 1933 and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst*, 425 U.S. at 206. Congress created a number of express causes of actions for potential civil liability, but also placed "significant procedural restrictions" on those actions, including a relatively short statute of limitations and a bonding requirement for defendants' costs and attorneys' fees. *Id.* at 209; *see id.* at 209-11 & n.28. Courts, including this Court, also have inferred certain private causes of actions under those laws. In doing so, however, the Court has

been careful to ensure that such inferred causes of actions do not undermine the statutory scheme, and protections, enacted by Congress. *See id.* at 210.

This Court has "acquiesced" in the "acceptance by the lower federal courts of an implied action [for damages] under § 10(b)" of the Exchange Act. *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 577 n.19 (1979). In *Ernst & Ernst*, however, the Court concluded the implied action under Section 10(b) and Rule 10b-5—which makes it illegal "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made . . . not misleading"—requires a showing of scienter. *Ernst & Ernst*, 425 U.S. at 212, 214-15 (alteration in original) (citation omitted). Mere negligence, the Court held, is not enough. *Id.* at 214. In so holding, the Court looked not only to the text of Section 10(b) and Rule 10b-5, but also to the fact that where Congress has expressly enact a civil remedy for "negligent conduct," it provided "significant procedural restrictions" that are absent in Section 10(b). *Id.* at 208-09.

That same analysis—of both the text that is present and the protections that are absent—applies to any private right of action that can be inferred under Section 14(e). As this Court has already recognized, the text of Section 14(e) is "modeled on the antifraud provisions of § 10(b) . . . and Rule 10b-5," and Section 14(e) is thus an "'antifraud prohibition,'" too. *Schreiber*, 472 U.S. at 10 (quoting *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 24 (1977)). It sets out, in a single sentence, a substantive proscription against various kinds of false and deceptive acts—namely, making "any untrue statement of a material fact," "omit[ting] to state any material fact necessary

in order to make the statements made . . . not misleading," "fraudulent . . . acts or practices," "deceptive . . . acts or practices," "or manipulative acts or practices." 15 U.S.C. § 78n(e).

One cannot properly interpret any one of those proscriptions without considering all of them. Indeed, as this Court has repeatedly explained, courts should not "construe statutory phrases in isolation," but rather must "read statutes as a whole." *United States v. Morton*, 467 U.S 822, 828 (1984). Relatedly, this Court has also consistently stressed that "the words of a statute must be read in their context." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167, 174 (2012) ("Context is a primary determinant of meaning.").

Here, Congress used a number of words—"fraudulent," "deceptive," and "manipulative"—that undeniably "connote[] intentional or willful conduct designed to deceive or defraud investors"—"a type of conduct quite different from negligence." *Ernst & Ernst*, 425 U.S. at 199; *see id.* at 214. And because words are "known by the company [they] keep[]," *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015), it follows that the other words in the same sentence were intended to have the same connotation. That is particularly true where, as here, ignoring those neighbors would give "unintended breadth to the Acts of Congress." *Id.* (citation omitted). And that means Congress's references to "untrue statements" and omissions must be read in light of the surrounding references to "fraudulent," "deceptive," and "manipulative" conduct in the same sentence.

Construing the list of proscribed acts in Section 14(e) together, it is clear that Section 14(e) is

concerned with purposeful misrepresentations and omissions, not merely negligent ones. The rulemaking authority that Congress delegated to the SEC in the second sentence of Section 14(e) only reinforces that conclusion. There, Congress authorized the SEC to promulgate rules and regulations "reasonably designed to prevent[] such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. § 78n(e). That clause confirms Section 14(e)'s antifraud focus and further dispels the notion that Congress sought to broadly proscribe negligent as well as intentional conduct.

Like Section 10(b), Section 14(e) also *lacks* the "significant procedural restrictions" that Congress has included when it has created an express right of action under the securities laws for negligence. *Ernst & Ernst*, 425 U.S. at 208-09. As this Court recognized in *Ernst & Ernst*, *see id.* at 209-10, and again in *Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 178-79 (1994), the "express private causes of action in the 1933 and 1934 Acts" are an important benchmark for determining the scope of any inferred causes of actions under the Acts. Looking to the elements of those express private causes of action strongly supports the conclusion that Congress did not intend any inferred private cause of action in Section 14(e) to cover negligence.

This Court has never previously recognized a private right of action under Section 14(e). Some lower courts have created one by inference, but (until now) those courts had recognized that the federal courts that have "created" an inferred right of action "have a special responsibility to consider the consequences of their rulings and to mold liability fairly to reflect the circumstances of the parties."

Adams, 623 F.2d at 428. Until the Ninth Circuit's decision in this case, every court to exercise that "special responsibility" had refused to extend the inferred private right of action to negligent conduct.

Such restraint is always warranted when it comes to the disfavored practice of inferring a private right of action, *see Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001), but it is especially warranted here. Indeed, as Judge Friendly observed in a similar vein in *SEC v. Texas Gulf Sulphur Co.*, the consequences of inferring a cause of action based on a negligent misstatement or omission in a securities filing are "frightening." 401 F.2d 833, 866-68 (2d Cir. 1968) (concurring), *cert. denied*, 394 U.S. 976 (1969).

Texas Gulf Sulphur concerned whether to infer a damages action for negligence under Section 10(b) and Rule 10b-5, but Judge Friendly's admonition is just as applicable to the prospect of imposing civil liability for negligence under Section 14(e): "[A] rule imposing civil liability in such cases would work directly counter to what the SEC has properly called a commendable and growing recognition on the part of industry . . . of the importance of informing security holders and the public generally with respect to important business and financial developments." *Id.* at 867 (internal quotation marks and citation omitted). If a negligent omission or misstatement can be a basis for civil liability under Section 14(e), then a company may believe it better to stand behind the adequacy of its existing filings even when it determines that additional information might be helpful to investors, lest any new filings be used as evidence that the earlier filings were negligently deficient.

This Court can decide this case—and reverse the decision below—on the assumption that the lower courts have properly inferred a private right of action under Section 14(e) for *intentional* violations. But if it believes that any inferred cause of action that exists under Section 14(e) may be applied to negligent behavior as well, then it should reexamine whether a private right of action can be inferred at all under Section 14(e). The answer, under modern precedent, would be that it cannot. While there was a time when this Court inferred rights of action relatively freely, it has since "sworn off th[at] habit." *Sandoval*, 532 U.S. at 287; *see Central Bank of Denver*, 511 U.S. at 173. Viewed under the rigorous standard that this Court applies today, there is no basis for inferring any private right of action under Section 14(e).

2. In nevertheless inferring a private right of action under Section 14(e) for negligence, the Ninth Circuit relied primarily on this Court's decisions in *Ernst & Ernst* and *Aaron*. *See* App. 10a-15a. But neither of those decisions can support the Ninth Circuit's expansive new private remedy.

The Ninth Circuit believed that *Ernst & Ernst* was significant because of its statement that the text of Rule 10b-5—on which Section 14(e) was modeled—"could be read as proscribing, respectively, *any type* of material misstatement or omission . . . *whether the wrongdoing was intentional or not*." App. 10a (alterations in original) (quoting *Ernst & Ernst*, 425 U.S. at 212). "This means," the Ninth Circuit reasoned, "that Rule 10b-5(b)'s text, and by extension the identical phrasing in the first clause of Section 14(e), did not necessarily compel finding a scienter requirement." *Id.* at 11a.

But as *Ernst & Ernst* itself illustrates, to say that the text of Rule 10b-5 does "not necessarily compel finding a scienter requirement" hardly means that any inferred right of action "necessarily" should extend to negligence. In any event, the Ninth Circuit's analysis fails to account for the fact that Section 14(e) must be read as a whole, and in light of its antifraud objective. *See supra* at 16-18. Moreover, in focusing on one sentence from the opinion, the Ninth Circuit missed the central teaching of *Ernst & Ernst*: that the statutory scheme enacted by Congress in the 1933 and 1934 Acts strongly compels the conclusion that Congress would not have intended a private cause of action for mere negligence in the absence of the "significant procedural restrictions" that it imposed for the express causes of actions it created that cover negligent behavior. *See* 425 U.S. at 208-11. That applies equally to Section 14(e).

The Ninth Circuit's reliance on *Aaron* was also misplaced. The Ninth Circuit stressed that, in *Aaron*, this Court had held that Section 17(a)(2) of the 1933 Act "does *not* require a showing of scienter." App. 12a. But the Ninth Circuit overlooked that, unlike Section 14(e), Section 17 of the 1933 Act was not "modeled on the antifraud provisions of § 10(b) of the [1933] Act and Rule 10b-5." *Schreiber*, 472 U.S. at 10. Moreover, in *Aaron* the SEC was not pursuing a damages remedy under an inferred cause of action, but instead was proceeding under an *express* public cause of action, contained in Section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b), that authorizes the agency to pursue injunctive relief. *See Aaron*, 446 U.S. at 686.

Aaron is this distinguishable in two important respects. First, because it involved an express cause of action, the principles that restrain judicial creation

of an implied private remedy did not apply. And second, because *Aaron* involved only a request for injunctive relief, the additional limits that have traditionally applied to securing damages for alleged fraud did not apply. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193 (1963) ("It is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages."); *Texas Gulf Sulfur Co.*, 401 F.2d at 867-68 (Friendly, J, concurring) (similar). *Aaron*'s holding that a finding of scienter is unnecessary for issuance of an injunction in a suit brought by the SEC under the express cause of action for violations of Section 17(a) therefore by no means suggests that scienter is unnecessary to secure damages or other relief pursuant to any implied private right of action based on Section 14(e).

In any event, the fact that the Ninth Circuit read this Court's decisions to require creation of an expansive private remedy for negligence that had been rejected by every other court to consider it just underscores the need for this Court's intervention.

C. The Question Presented Is Exceptionally Important And Warrants Review Here

The question presented also is undeniably important and one that warrants this Court's review.

1. The federal securities laws not only are key to the efficient functioning of markets, but also are prone to litigation abuses, as Congress itself recognized in the PSLRA. *Supra* at 6. If allowed to stand, the Ninth Circuit's decision will fundamentally alter the civil liability regime that courts have applied under Section 14(e) for half a century and create the

very litigation abuses that Congress has sought to prevent in order to protect businesses and markets.

Even before the decision below, the Ninth Circuit was a magnet for securities cases, many of which are filed as class actions. It was home to more merger-related securities suits than any other circuit, including the Second and Third Circuits where most of the companies subject to such suits are (respectively) listed and incorporated. In 2017, for example, plaintiffs' lawyers filed more than one-fifth of all merger-related class actions in the Ninth Circuit. *See* Cornerstone Research, *Securities Class Action Filings—2017 Year In Review* 13 (2018), http://bit.ly/Cornerstone2017YIR. In 2016, it was even higher—nearly one-third, which was more than double the number in any other circuit. *See id.*

That is no happenstance. Venue under the 1934 Act is available in any district "wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. § 78aa(a). The Ninth Circuit, and northern California in particular, is home to one of the Nation's hotbeds of corporate startups that present attractive acquisition targets. And even if they are not based in the Ninth Circuit, most publicly traded companies at the very least transact business there. Accordingly, almost *every* merger that is subject to the securities laws can be challenged in the Ninth Circuit. And now that the Ninth Circuit has embraced a negligence standard for damages claims that the Second and Third Circuits (and every other circuit to have weighed in) has rejected, there is every reason to believe that they *will* be challenged there. As one commentator put it, "[i]f investors have the option of suing over an M&A deal in California, Nevada, or

other West Coast states, I suspect they will after [the] decision . . . in *Varjabedian*." Frankel, *supra*.

In effect, the venue rules and plaintiffs' lawyers control of the district in which class actions are filed are likely to mean that a position that had never been accepted in the first fifty years of Section 14(e)'s existence will, without this Court's intervention, suddenly become the de facto national standard.

2. That standard is seriously misguided, for the reasons already discussed. In a regime where a showing of scienter is required to bring a private damages action under Section 14(e), and where the SEC may seek injunctive relief under Section 17(a) for negligence, there are ample incentives for businesses to avoid material misstatements or omissions—and to correct any that are made when they are discovered. *See supra* at 19. But the Ninth Circuit's adoption of a negligence standard for private damages claims—potentially applicable to every merger or acquisition of a publicly traded company (no matter where it is listed, incorporated, or headquartered)—fundamentally shifts the balance struck by Congress. Companies and their directors (who, like the individual petitioners here, face piggyback claims under Section 20 of the Exchange Act) will now be exposed to a much greater threat of abusive litigation and will have to grapple with whether any corrective disclosures will be read as admissions of negligence that subject them to backward-looking liability—likely restricting the flow of information into the market. That is precisely the opposite of what Section 14(e) was intended to accomplish.

Moreover, because it is far easier to plead facts that support an inference of negligence than to plead facts that support an inference of scienter, the

decision below will substantially weaken the protections that Congress enacted against abusive strike suits in the PSLRA. "Today, the public announcement of virtually every transaction involving the acquisition of a public corporation [already] provokes a flurry of class action lawsuits . . . ." *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 891 (Del. Ch. 2016). The vast majority of such suits are dismissed—between 2009 and 2016, 78 percent of securities suits based on M&A transactions were dismissed, a rate significantly higher than for other types of federal securities suits. *See* Cornerstone Research, *supra*, at 14. By allowing such suits to continue based merely on a plausible allegation of negligence in communications around the transaction, however, the Ninth Circuit has all but assured that many of those suits will continue past the pleading stage and into tremendously expensive and time-consuming discovery. And because of the enormous risks presented by class claims, the reality is that defendants will often have little choice but to settle such claims, regardless of their ultimate merit.

This Court has often granted certiorari to clarify the pleading standards for bringing federal securities claims and vindicate Congress's goal of reducing frivolous securities litigation. *See, e.g., Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). And this Court has granted certiorari to review, and correct, decisions expanding the scope of liability under inferred private rights of action for violations of the federal securities laws. *See, e.g., Central Bank of*

Denver, 511 U.S. 164; *Ernst & Ernst*, 425 U.S. 185. This case presents the equally important question of the substantive standard for pleading and proving a claim under Section 14(e). Moreover, it provides an opportunity for this Court to underscore the restraint that is warranted when federal courts are asked to infer, or opine on the scope of, a private damages action under the federal securities laws.

The Ninth Circuit's discovery, for the first time in the statute's 50-year existence, of an inferred private right of action under Section 14(e) for damages and other relief based on a showing of mere negligence, cries out for this Court's review. And this case, in which the Ninth Circuit reversed the grant of judgment for petitioners under the previously settled scienter rule, is an ideal vehicle for such review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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October 11, 2018

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Gary VARJABEDIAN, Plaintiff-Appellant,

v.

EMULEX CORPORATION; Bruce C. Edwards; Jeffrey W. Benck; Gregory S. Clark; Gary J. Daichendt; Paul F. Folino; Beatriz V. Infante; John A. Kelley; Rahul N. Merchant; Nersi Nazari; Dean A. Yoost; Avago Technologies Wireless (USA) Manufacturing, Inc.; Emerald Merger Sub, Inc., Defendants-Appellees.

No. 16-55088

Argued and Submitted October 5, 2017, Pasadena, California

Filed April 20, 2018

888 F.3d 399

OPINION

MURGUIA, Circuit Judge:

Plaintiff-Appellant Jerry Mutza[1] ("Plaintiff") appeals the district court's dismissal of his putative

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[1] Although Gary Varjabedian filed the initial complaint and the notice of appeal, the district court appointed Jerry Mutza as Lead Plaintiff in this case. Indeed, both Plaintiff-Appellant's opening brief and the answering brief identify Jerry Mutza as the court-appointed Lead Plaintiff in this action. The case caption, however, reflects Varjabedian as Plaintiff. There is no material difference between Mutza and Varjabedian for purposes of this appeal, as they both represent the same class of Emulex shareholders and are represented by the same counsel.

securities class action complaint, brought on behalf of former Emulex Corporation shareholders. The district court dismissed Plaintiff's complaint because he failed to plead a strong inference of scienter for Defendants' alleged violations of Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) ("Exchange Act"). In so concluding, the district court followed out-of-circuit authorities holding that Section 14(e) claims require proof of scienter. The district court noted, however, that the Ninth Circuit had yet to decide whether Section 14(e) claims require plaintiffs to plead that defendants acted with scienter. We now hold that Section 14(e) of the Exchange Act requires a showing of negligence, not scienter. Accordingly, we reverse the dismissal of the complaint and remand the case to the district court for it to reconsider Defendants' motion to dismiss under a negligence standard.

Moreover, because Plaintiff's Section 14(e) claim survives, his claim under Section 20(a) of the Exchange Act also remains. Further, for the reasons detailed below, we affirm the district court's (1) conclusion that Section 14(d)(4) of the Exchange Act does not create a private right of action and (2) dismissal of the complaint as to Emerald Merger Sub, Inc. because it is not a proper defendant.

I. BACKGROUND

This case centers on the merger between Emulex Corp. ("Emulex") and Avago Technologies Wireless Manufacturing, Inc. ("Avago"). Emulex was a Delaware-incorporated technology company that sold storage adapters, network interface cards, and other products. On February 25, 2015, Emulex and Avago issued a joint press release announcing that they had

entered into a merger agreement, with Avago offering to pay $8.00 for every share of outstanding Emulex stock. The $8.00 price reflected a premium of 26.4% on Emulex's stock price the day before the merger was announced.

Pursuant to the terms of the announced merger agreement, a subsidiary of Avago, Emerald Merger Sub, Inc. ("Merger Sub"), initiated a tender offer for Emulex's outstanding stock on April 7, 2015. A tender offer is a technique whereby the offeror, Avago, seeks to obtain control of a target corporation, here Emulex, by publicly offering to purchase a specified amount of the target company's stock. *See* Arthur Fleisher, Jr. & Robert H. Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 317 (1967). The offeror requests the stockholders of the target corporation "tender" their shares, at a fixed price, customarily in excess of the current market value, in order to gain control of the target company. *Id.*; *see also Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 22, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977). When a tender offer is made, the target company often issues a statement to its shareholders recommending that they either accept or reject the tender offer. Emulex decided to issue such a statement but, before doing so, hired Goldman Sachs to determine whether the proposed merger agreement would be fair to shareholders. Goldman Sachs determined that the agreement would be fair to shareholders and provided Emulex with financial analyses supporting Goldman Sachs's position. Based in part on Goldman Sachs's opinion, Emulex filed a 48-page Recommendation Statement with the Securities and Exchange Commission ("SEC") pursuant to 17 C.F.R. § 240.14d-101 Schedule 14D-9.

The Recommendation Statement supported the tender offer and recommended that shareholders tender their shares. It listed nine reasons for the recommendation: (1) the value shareholders would receive in the merger "was greater than could be reasonably expected" in the future if they continued to hold Emulex stock; (2) other available alternatives and transactions were less favorable; (3) Emulex shareholders would receive a premium on their stock; (4) Goldman Sachs found that the merger was fair; (5) the cash consideration shareholders would receive was certain; (6) the agreement provided that Emulex could back out if it received a better offer before closing; (7) the agreement permitted Emulex to modify its recommendation; (8) a termination fee built into the merger agreement would not preclude subsequent third-party offers for Emulex; and (9) closing conditions were appropriate.

The Recommendation Statement in support of the tender offer also included a summary of Goldman Sachs's fairness opinion. The summary describes in some detail the processes Goldman Sachs followed when rendering its opinion. The Recommendation Statement also highlights four particular financial analyses—the Historical Stock Trading Analysis, the Selected Companies Analysis, the Illustrative Present Value of Future Share Price Analysis, and the Illustrative Discounted Cash Flow Analysis—that supported Goldman Sachs's fairness opinion. These analyses looked at different metrics of Emulex's past, present, and expected financial performance to help Goldman Sachs develop its fairness opinion.

Goldman Sachs also produced a one-page chart titled "Selected Semiconductor Transactions," alternatively referred to as the "Premium Analysis."

The Premium Analysis selected certain transactions in the industry that Goldman Sachs deemed most similar to the proposed merger between Avago and Emulex, and reviewed the respective premiums stockholders received in those transactions. Altogether, the Premium Analysis collected seventeen transactions involving a semiconductor company between 2010 and 2014. Emulex's 26.4% premium fell within the normal range of semiconductor merger premiums listed in the Premium Analysis, but it was below average. Goldman Sachs opined that the merger was fair despite a below-average premium, and Emulex elected not to summarize the one-page Premium Analysis in the Recommendation Statement. Enough Emulex shareholders ultimately accepted the tender offer to consummate the merger. On May 5, 2015, Merger Sub merged into Emulex, with Emulex surviving as a wholly-owned subsidiary of Avago.

Not all the shareholders, however, were happy with the merger's terms. Some believed the $8.00-per-share price offered was inadequate given Emulex's significant growth leading up to the tender offer and the company's prospects for future growth. This class of shareholders, who claimed they were misled by Emulex, Avago, Merger Sub, and the Emulex Board of Directors (collectively, "Defendants") into believing that the merger was better than it actually was, brought a lawsuit against Defendants. The district court eventually named Mutza Lead Plaintiff. Plaintiff alleges that Defendants violated federal securities laws, specifically Section 14(e) of the Exchange Act, by failing to summarize the Premium Analysis in the Recommendation Statement, which would have

disclosed that the 26.4% premium was below average compared to similar mergers. Plaintiff also sought to hold the directors of Emulex vicariously liable as "controlling persons" under Section 20(a) of the Exchange Act.

The district court dismissed the complaint with prejudice. In deciding to do so, the district court concluded that Section 14(e) requires a showing of scienter and that Plaintiff failed to plead scienter. Next, the district court rejected Plaintiff's separate claim under Section 14(d), concluding that Section 14(d)(4) does not establish a private right of action for shareholders confronted with a tender offer. Finally, the court dismissed the Section 20(a) claim because Plaintiff did not adequately plead a claim under Section 14(d) or (e).[2] Plaintiff timely appeals.

II. STANDARD OF REVIEW

We review *de novo* a district court's decision to grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). We also review *de novo* questions of statutory interpretation. *Millard v. United Student Aid Funds, Inc.*, 66 F.3d 252, 253 (9th Cir. 1995). Because Plaintiff argues that Section 14(e) of the Exchange Act requires Plaintiff to show Defendants were negligent by not including the Premium Analysis in the Recommendation

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[2] Claims under Section 20(a) necessarily rise and fall with the other securities claims. To prevail on a Section 20(a) claim, "a plaintiff must first prove a primary violation of underlying federal securities laws, such as Section [14(e)], and then show that the defendant exercised actual power over the primary violator." *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1052 (9th Cir. 2014).

Statement—not that Defendants intentionally excluded the Premium Analysis to mislead shareholders—this case requires us to interpret Section 14(e).

III. DISCUSSION

A. Section 14(e) Claim

1. Federal Securities Law Background

The Exchange Act of 1934, codified at 15 U.S.C. §§ 78a–78qq, is one of two major federal securities statutes Congress enacted in the wake of the Great Depression. The other statute is the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa. The Exchange Act and the Securities Act of 1933 differ in purpose and scope. "The general purpose of the Securities Act [of 1933] is to regulate the initial distribution of securities by issuers to public investors. . . . The Exchange Act [of 1934] provides for the regulation of the securities exchange markets and the operations of the corporations listed on the various national securities exchanges." Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 Ohio St. L.J. 329, 330 (1988). In other words, the Securities Act of 1933 governs initial public offerings ("IPOs") while the Exchange Act, at issue here, regulates all subsequent securities transactions (*e.g.*, sales on the open market, proxy solicitations, tender offers).

Section 14(e) was not part of the original Exchange Act enacted in 1934. Rather, Congress added Section 14(e) as an amendment to the Securities Exchange Act as part of the Williams Act. *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8, 105 S.Ct. 2458, 86

L.Ed.2d 1 (1985). The purpose of Section 14(e) is to regulate the conduct of a broad range of people who could influence the outcome of a tender offer. *Piper*, 430 U.S. at 24, 97 S.Ct. 926. To that end, Section 14(e) "was expressly directed at the conduct of a broad range of persons, including those engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer." *Id.*

2. Whether Section 14(e) requires Plaintiff to show Defendants knew their actions were wrong or only that they were negligent

The main question here is whether Section 14(e) requires proof of scienter, as the district court held, or mere negligence. "Statutory interpretation begins with the plain language of the statute." *United States v. Johnson*, 680 F.3d 1140, 1144 (9th Cir. 2012) (internal quotation marks omitted). A plain reading of Section 14(e) readily divides the section into two clauses, each proscribing different conduct:

> It shall be unlawful for any person [1] to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, *or* [2] to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . .

15 U.S.C. § 78n(e) (emphasis added). The use of the word "or" separating the two clauses in Section 14(e) shows that there are two different offenses that the statute proscribes; to construe the statute otherwise would render it "hopelessly redundant" and would

mean "one or the other phrase is surplusage." *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976).

In concluding that claims under Section 14(e) require allegations of scienter, the district court stated: "Considering the wealth of persuasive case law to the contrary, the Court concludes that the better view is that the similarities between Rule 10b-5 and § 14(e) require a plaintiff bringing a cause of action under § 14(e) to allege scienter."[3] The district court relied on decisions from five other circuits holding that Section 14(e) claims require alleging scienter. *See, e.g., Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009); *In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004); *SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004); *Conn. Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 961 (2d Cir. 1987); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 431 (6th Cir. 1980). However, we are persuaded that the rationale underpinning those decisions does not apply to Section 14(e) of the Exchange Act. At their core, the decisions from these five circuits rest on the shared text found in both Rule 10b-5 and Section 14(e). Yet important distinctions exist between Rule 10b-5 and Section 14(e)—distinctions that strongly militate against importing the scienter requirement from the context of Rule 10b-5 to Section 14(e).

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[3] Rule 10b-5 is an SEC regulation promulgated under Section 10(b) of the Exchange Act. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989–990 (9th Cir. 2009). The rule provides that "'[i]t shall be unlawful for any person . . . [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.'" *Id.* (citing 17 C.F.R. § 240.10b-5(c)).

The first of the other circuits' decisions came in 1973, a few years after Section 14(e) was enacted, when the Second Circuit held that Section 14(e) requires a showing of scienter: "[W]e shall follow the principles developed under Rule 10b-5 regarding the elements of [Section 14(e)] violations." *Chris-Craft Indus. Inc., v. Piper Aircraft Corp.*, 480 F.2d 341, 362 (2d Cir. 1973).

One year after *Chris-Craft*, the Fifth Circuit followed suit and held, "[w]e are in accord with the Second Circuit that the same elements must be proved to establish a violation of either [Section 14(e)] or [Rule 10b-5]." *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 605 (5th Cir. 1974) (citing *Chris-Craft*, 480 F.2d at 362). Those two circuits arrived at the conclusion that Rule 10b-5 required a showing of scienter.

Then, in 1976, the Supreme Court in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976), held that claims under Section 10(b) of the Exchange Act and Rule 10b-5 must allege scienter. Importantly, as it relates to this case, the Supreme Court's reasoning in reaching that decision casts doubt on the rationale of *Chris-Craft* and *Smallwood*. The Court in *Ernst & Ernst* began with the text of Rule 10b-5(b), which states: "It shall be unlawful . . . [t]o make any untrue statement of a material fact or omit to state any material fact . . . ." *Ernst & Ernst*, 425 U.S. at 195–96, 96 S.Ct.1375. Addressing that phrase, the Court noted, "[v]iewed in isolation the language of [Rule 10b-5(b)] . . . could be read as proscribing, respectively, *any type* of material misstatement or omission . . . *whether the wrongdoing was intentional or not*." *Ernst & Ernst*, 425 U.S. at 212, 96 S.Ct. 1375 (emphases added). In other words, the Court

acknowledged that the wording of Rule 10b-5(b) could reasonably be read as imposing a scienter *or a negligence* standard. This means that Rule 10b-5(b)'s text, and by extension the identical phrasing in the first clause of Section 14(e), did not necessarily compel finding a scienter requirement. *Compare* 17 C.F.R. § 240.10b-5(b), *with* 15 U.S.C. § 78n(e).

The Court in *Ernst & Ernst* nevertheless went on to conclude that Rule 10b-5(b) requires a showing of scienter because of the relationship between Rule 10b-5 and its authorizing legislation, Section 10(b) of the Exchange Act. Significantly, the Court's conclusion that scienter is an element of Rule 10b-5(b) had nothing to do with the text of Rule 10b-5. As the Court explained:

> Rule 10b-5 was adopted pursuant to authority grand [*sic*] the [SEC] under § 10(b) . . . . [The scope of Rule 10b-5] cannot exceed the power granted the [SEC] by Congress under § 10(b). . . . *[W]e think the [SEC's] original interpretation of Rule 10b-5 was compelled by the language and history of § 10(b)* . . . . When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances—the commonly understood terminology of intentional wrongdoing—and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct.

Ernst & Ernst, 425 U.S. at 212–14, 96 S.Ct. 1375 (emphasis added). Put simply, Rule 10b-5 requires a showing of scienter because it is a regulation promulgated under Section 10(b) of the Exchange Act,

which allows the SEC to regulate *only* "manipulative or deceptive device[s]." 15 U.S.C. § 78j(b). This rationale regarding Rule 10b-5 does not apply to Section 14(e), which is a statute, not an SEC Rule.

Later in 1980, the Supreme Court provided useful guidance for interpreting the first clause of Section 14(e) of the Exchange Act in *Aaron v. SEC*, 446 U.S. 680, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). The securities provision at issue in *Aaron*—Section 17(a)(2) of the Securities Act of 1933—and the first clause of Section 14(e), contain nearly identical wording. Both sections prohibit "any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made . . . not misleading."[4] *Compare* 15 U.S.C. § 77q(a)(2), *with* 15 U.S.C. § 78n(e). Importantly, the Court in *Aaron* held that Section 17(a)(2) does *not* require a showing of scienter. *Aaron*, 446 U.S. at 696–97, 100 S.Ct. 1945.

Although Section 17(a)(2) appears in the Securities Act of 1933, while Section 14(e) appears in the Exchange Act, "statutes dealing with similar subjects should be interpreted harmoniously." *Jonah R. v. Carmona*, 446 F.3d 1000, 1007 (9th Cir. 2006) (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701,

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[4] Section 17(a)(2) contains additional language that is missing from the first clause of Section 14(e). Specifically, the phrase "to obtain money or property by means of," appears in Section 17(a)(2) but not in Section 14(e). This phrase did not factor into the Supreme Court's analysis, and there is no meaningful discussion of the significance of these words in *Aaron*. Instead, the words that were outcome determinative are the same words appearing in both provisions: "by means of any untrue statement of a material fact or any omission to state a material fact." *Aaron*, 446 U.S at 696, 100 S.Ct. 1945.

738–39, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) (Scalia, J., concurring)). Beyond their nearly identical text, Section 14(e) and Section 17(a) serve similar purposes. Both provisions govern disclosures and statements made in connection with an offer of securities, albeit in different contexts: Section 17(a) applies to initial public offerings while Section 14(e) applies to tender offers. *Chris-Craft*, 480 F.2d at 359 ("The Williams Act of 1968, of which § 14(e) is a part, was enacted to . . . require tender offer disclosures *similar to those required for issuance of new securities*." (emphasis added)).

Accordingly, both *Ernst & Ernst* and *Aaron* cast doubt on the underlying rationale of *Chris-Craft* and *Smallwood*. *Ernst & Ernst* provides that the scienter requirement is rooted not in the text of Rule 10b-5, but rather in the relationship between Rule 10b-5 and its authorizing legislation. *Ernst & Ernst*, 425 U.S. at 212–14, 96 S.Ct.1375. *Aaron* took a further step by holding that the plain language of Section 17(a)(2), which is largely identical to the first clause of Section 14(e), requires a showing of negligence, not scienter. *Aaron*, 446 U.S. at 696–97, 100 S.Ct. 1945. In so doing, *Aaron* rejected the Second Circuit's rationale for holding that a negligence standard does not apply to claims under Section 17(a).[5]

Despite the Supreme Court's decisions in *Ernst & Ernst* and *Aaron*, circuit courts have continued to

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[5] In *Chris-Craft*, the Second Circuit rejected the argument that Section 17(a) imposes a mere negligence standard. 480 F.2d at 363 ("We have indicated, however, that mere negligent conduct is not sufficient to permit plaintiffs to recover damages in a private action under § 17(a) or § 10(b)." (internal quotation marks omitted)).

adopt the reasoning in *Chris-Craft* and *Smallwood*. For instance, in 1987, the Second Circuit cited *Chris-Craft*, holding that "[i]t is well settled in this Circuit that scienter is a necessary element of a claim for damages under § 14(e) of the Williams Act." *Conn. Nat'l Bank*, 808 F.2d at 961. Likewise, as recently as 2009, the Fifth Circuit cited *Smallwood* for the proposition that "[t]he elements of a claim under Section 14(e), which applies to tender offers, are identical to the Section 10(b)/Rule 10b-5 elements." *Flaherty*, 565 F.3d at 207. Similarly, in 2004, the Third Circuit cited *Smallwood* and held, "[w]e therefore join those circuits that hold that scienter is an element of a Section 14(e) claim." *Digital Island*, 357 F.3d at 328.

The two other circuits to reach this conclusion also do not account for the distinction between Rule 10b-5 and Section 14(e). The Sixth Circuit, for instance, concluded that Section 14(e) requires scienter because "Congress used the words 'fraudulent,' 'deceptive,' and 'manipulative.'" *Adams*, 623 F.2d at 431. The Sixth Circuit does not appear to have considered that the *first* clause of Section 14(e) does not contain any of those words. In fact, the *Adams* decision predated the *Aaron* decision by a month, so the Sixth Circuit did not have the benefit of the Supreme Court's decision in *Aaron* holding that the language of Section 17(a)(2), and by extension the language of the first clause of Section 14(e), requires only a showing of negligence.

Lastly, the Eleventh Circuit appears to have concluded, for the first time in 2004, that Section 14(e) requires scienter, but it seems to have relied on the common wording in Rule 10b-5 and Section 14(e). *See Ginsburg*, 362 F.3d at 1297–98. Although the court

cited to *SEC v. Adler*, 137 F.3d 1325, 1340 (11th Cir. 1998), to support the proposition that Section 14(e) claims require a showing of scienter, *Adler* does not analyze or discuss Section 14(e). Accordingly, it seems that *Ginsburg* too relied on the common wording of Rule 10b-5 and Section 14(e) for its holding that Section 14(e) claims require scienter. With the benefit of *Ernst & Ernst* and *Aaron*, the most compelling argument is that the first clause of Section 14(e) requires a showing of negligence, not scienter.

Moreover, Section 14(e) differs fundamentally from Section 10(b) because, under Section 14(e), the SEC is authorized to regulate a broader array of conduct than under Section 10(b). "[U]nder § 14(e), the [SEC] may prohibit acts not themselves fraudulent under the common law or § 10(b), if the prohibition is 'reasonably designed to prevent . . . acts and practices [that] are fraudulent.'" *United States v. O'Hagan*, 521 U.S. 642, 673, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997) (alterations in original) (quoting 15 U.S.C. § 78n(e)). "This authority derives from the prophylactic rule-making power granted to the SEC by Section 14(e), *a power that has no parallel in Section 10(b).*" *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1005 (9th Cir. 2002) (emphasis added). If the SEC can prohibit "acts themselves not fraudulent" under Section 14(e), then it would be somewhat inconsistent to conclude that Section 14(e) itself reaches only fraudulent conduct requiring scienter.

The conclusion that Section 14(e) requires a showing of negligence, as opposed to scienter, also finds some support in the legislative history and purpose of the Williams Act. The Senate Report that accompanied Section 14(e) states: "This provision

would affirm the fact that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal." S. Rep. No. 510, 90th Cong., 2d Sess. (1968). Moreover, the Supreme Court has noted, "[t]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975). The legislative history suggests that the Williams Act places more emphasis on the quality of information shareholders receive in a tender offer than on the state of mind harbored by those issuing a tender offer. Such a purpose supports a negligence standard.

Ultimately, because the text of the first clause of Section 14(e) is devoid of any suggestion that scienter is required, we conclude that the first clause of Section 14(e) requires a showing of only negligence, not scienter.

B. Omission of a material fact

The district court did not reach the question whether omitting the Premium Analysis—a one-page chart containing seventeen transactions involving semiconductor companies—from the Recommendation Statement constitutes omission of a material fact in the context of the entire transaction, and we will not reach the question. Although it is difficult to show that this omitted information was indeed material, we remand for the district court to consider the question in the first instance. *See Zucco Partners*, 552 F.3d at 991 ("[T]he plaintiff must plead

a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." (internal quotation marks omitted)).

C. Section 14(d)(4) claim

The parties contest whether Section 14(d)(4) of the Exchange Act provides an implied right of action. The statute provides that "[a]ny solicitation or recommendation to the holders of . . . a security to accept or reject a tender offer . . . shall be made in accordance with [SEC] rules and regulations." 15 U.S.C. § 78n(d)(4). One such regulation, Rule 14d-9, states that a recommendation statement must include "information required by Items 1 through 8 of Schedule 14D-9 or a fair and adequate summary thereof." 17 C.F.R. § 240.14d-9(d). In addition, Item 8 on Schedule 14D-9 requires a company's directors to furnish "information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading." 17 C.F.R. § 240.14d-101; 17 C.F.R. § 229.1011(c). Simply put, Section 14(d)(4) imposes an obligation on a company's directors to provide material information if such information is necessary to ensure that other required disclosures are not materially misleading.

The test for determining whether a federal statute creates an implied right of action was set forth in *Cort v. Ash* and entails four questions:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted—that

> is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law . . . ?

422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) (citations and internal quotation marks omitted). The fourth factor—the relationship with state law—is not relevant here. After analyzing this claim under the *Cort* factors, the district court concluded that Section 14(d)(4) does not create a private right of action and dismissed this claim.

After reviewing the factors outlined in *Cort*, we agree with the district court. The first factor weighs against finding an implied right of action because the statute's focus is on the person regulated, those who issue "[a]ny solicitation or recommendation to . . . accept or reject a tender offer." 15 U.S.C. § 78n(d)(4); *Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." (internal quotation marks omitted)).

Next, considering the second factor, there is no indication of any legislative intent to provide for a private right of action. Section 14(d)(4) is a generic statute simply requiring that recommendation statements abide by the SEC's rules.

> Finally, turning to the third factor, it would be inconsistent with the legislative scheme of the Williams Act to imply a remedy under Section 14(d)(4). It is undisputed that Section 14(e) provides for a private right of action to challenge alleged misrepresentations or omissions in connection with a tender offer. The question, then, is whether Congress intended to imply a private right of action under Section 14(d)(4) as an alternative to Section 14(e). However, holding that Section 14(d)(4) provides an implied right of action would be redundant and potentially cause tension with Section 14(e).

Accordingly, we affirm the district court's conclusion that Section 14(d)(4) does not create an implied right of action.

D. Section 20(a) claim

As stated above, claims under Section 20(a) of the Exchange Act necessarily depend on Plaintiff's Section 14(d)(4) and (e) claims. *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1052 (9th Cir. 2014). Because Plaintiff's Section 14(d)(4) claim fails, but Plaintiff's Section 14(e) claim remains, the Section 20(a) claim also survives for the district court to consider on remand.

E. Merger Sub Defendant

Finally, we affirm the district court's dismissal of Merger Sub as a Defendant in this case. The Federal Rules of Civil Procedure are clear that a corporation's capacity to be sued is determined "by the law under which it was organized." Fed. R. Civ. P. 17(b)(2). As a Delaware corporation, Merger Sub Corporation

ceased to exist after the merger was consummated, and its rights and liabilities now belong to the surviving corporation, Emulex. *See* 8 Del. C. § 259.

IV. CONCLUSION

We are aware that our holding today parts ways from our colleagues in five other circuits. However, for the reasons discussed above, we are persuaded that intervening guidance from the Supreme Court compels the conclusion that Section 14(e) of the Exchange Act imposes a negligence standard. Accordingly, we **REVERSE** the district court's decision as to the Section 14(e) claim because the district court employed a scienter standard in analyzing the Section 14(e) claim. We also **REMAND** for the district court to reconsider Defendant's motion to dismiss under a negligence standard. On remand, the district court shall also consider whether the Premium Analysis was material, an argument that Defendants raised but that the district court did not reach. In addition, the district court shall consider Plaintiff's Section 20(a) claim since the Section 14(e) claim survives. We also **AFFIRM** the district court's conclusion that Section 14(d)(4) does not create an implied right of action. Finally, we **AFFIRM** the district court's dismissal of Merger Sub because it is not a proper Defendant.

AFFIRMED in part, **REVERSED** in part, and **REMANDED**. The parties shall bear their own costs on appeal.

CHRISTEN, Circuit Judge, concurring:

I fully concur in today's decision and write separately only to explain why Supreme Court case law persuades me to depart from the interpretations

of § 14(e) announced by several other circuits. By my read, in considering what degree of culpability § 14(e) requires, these courts have not addressed the ramifications of the Supreme Court's holdings in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976), and *Aaron v. Securities & Exchange Commission*, 446 U.S. 680, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). I conclude that the decision we reach today is a faithful application of these Supreme Court cases.

The Second Circuit was among the first to consider the showing required to establish a § 14(e) violation. In *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973), the court observed that the language of § 14(e) is virtually identical to that of Rule 10b-5.[1] *Id.* at 362. The court reasoned that § 14(e) must therefore require scienter, the same degree of culpability required by Rule 10b-5, citing its earlier decision in *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968). In that case, the Second Circuit reviewed other sections of the Securities Exchange Act of 1934, but not Rule 10b-5's enabling statute. *Id.* at 854–55. A year later, the Fifth Circuit agreed with the Second Circuit's *Chris-Craft* decision, that "the same elements must be proved to establish a violation of either Section [14(e)] or . . . Rule [10b-5]." *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 605

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[1] Both § 14(e) and Rule 10b-5 prohibit "mak[ing] any untrue statement of a material fact [or omitting to state a material fact] necessary in order to make the statements . . ., in the light of the circumstances under which they [were] made, not misleading." Both § 14(e) and Rule 10b-5 also prohibit fraudulent or intentionally deceptive acts. *See* 15 U.S.C. § 78n(e); 17 C.F.R. § 240.10b-5(a).

(5th Cir. 1974) (citing *Chris-Craft Indust., Inc.*, 480 F.2d at 362).

In 1976, the Supreme Court also agreed that Rule 10b-5 requires a showing of scienter, but it reached this conclusion for a different reason. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). *Ernst & Ernst* observed that Rule 10b-5's authorizing statute, § 10(b), prohibited "any *manipulative or deceptive device or contrivance* in contravention of such rules and regulations as the [Securities and Exchange Commission] may prescribe." 425 U.S. at 187–88, 96 S.Ct. 1375 (emphasis added). Because this statutory language "strongly suggest[s]" that Congress intended § 10(b) to prohibit only knowing or intentional misconduct, *id.* at 197, 96 S.Ct. 1375, the Court concluded that the scope of Rule 10b-5 cannot exceed the threshold Congress established when it adopted § 10(b). *Id.* at 214, 96 S.Ct. 1375. Importantly, *Ernst & Ernst* expressly recognized that the language of Rule 10b-5, in isolation, "could be read as proscribing . . . any type of material misstatement or omission . . . that has the effect of defrauding investors, *whether the wrongdoing was intentional or not.*" *Id.* at 212, 96 S.Ct. 1375 (emphasis added). Nevertheless, the Court determined that the specific language of the authorizing statute necessarily cabins the sweep of the rule, so that a showing of scienter is required to establish a violation of Rule 10b-5. *Id.* at 212–14, 96 S.Ct. 1375.

In 1980 the Supreme Court explained that Congress sometimes required different levels of culpability within a single securities statute. *Aaron v. Securities & Exchange Commission* addressed the level of culpability required by § 17(a) of the

Securities Act of 1933, a statutory provision containing language nearly identical to the statute at issue in this case, § 14(e). 446 U.S. 680, 682, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). *Aaron* examined the text of § 17(a) and noted that only § 17(a)(1) includes the terms "device," "scheme," and "artifice":

> It shall be unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
>
> > (1) to employ any device, scheme, or artifice to defraud, or
> >
> > (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements . . ., in light of the circumstances under which they were made, not misleading . . . .

15 U.S.C. § 77q(a)(1)–(2) (emphasis added). Citing *Ernst & Ernst*, the *Aaron* Court explained that "device," "scheme," and "artifice" "all connote knowing or intentional practices," in sharp contrast to the language of § 17(a)(2), "which prohibits any person from obtaining money or property 'by means of any untrue statement [or omission] of a material fact.'" *Aaron*, 446 U.S. at 696, 100 S.Ct. 1945. Because § 17(a)(2) is "devoid of any suggestion whatsoever of a scienter requirement," *id.*, the Court held that § 17(a)(1) requires scienter, and that § 17(a)(2) does not. *Id.* at 697, 100 S.Ct. 1945.

Ernst & Ernst and *Aaron* are both critical to the decision we issue today. *Ernst & Ernst* explains that

where Congress prohibited "fraudulent" or "deceptive" practices—as in the second clause of § 14(e)—a heightened showing of culpability is required. Where Congress used language banning untrue statements of material fact (or the omission of a material fact necessary to make a statement not misleading), a lesser showing of culpability will suffice. With the holding of *Ernst & Ernst* in mind, the words Congress used in § 14(e) are illuminating:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, *or to engage in any fraudulent, deceptive, or manipulative acts or practices*, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C. § 78n(e) (emphasis added). Only the second clause of § 14(e) contemplates a scienter requirement; Congress did not use the words signaling a heightened standard of culpability in the first clause of the statute.[2]

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[2] This reading of § 14(e) is consistent with the Supreme Court's separate instruction that the scope of conduct that may be regulated under § 14(e) is broader than that under § 10(b). *See United States v. O'Hagan*, 521 U.S. 642, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997) (holding that under § 14(e), the SEC may prohibit "acts not themselves fraudulent under the common law or § 10(b), if the prohibition is reasonably designed to prevent acts and practices that are fraudulent" (internal quotation marks and alteration omitted)). Our court, too, has recognized

Aaron is important to today's decision because it reminds us that when Congress uses a disjunctive, a single statutory provision can call for more than one level of scienter. The similarities between the statute discussed in *Aaron*, § 17(a), and the statute at issue here, § 14(e), are striking: both statutes include distinct clauses separated by a disjunctive "or," with one clause containing terms that plainly proscribe more culpable conduct by using terms like "fraudulent," "deceptive," "device," or "artifice." And both statutes have a separate clause more expansively prohibiting "untrue statement[s] of a material fact." *See* 15 U.S.C. §§ 77q(a), 78n(3). Because *Aaron* held that § 17(a)'s two clauses require different degrees of culpability, it strongly suggests the same is true of the two very different clauses in § 14(e).

Some circuits continue to rule that § 14(e) requires scienter in the wake of *Ernst & Ernst* and *Aaron*, but in doing so they have maintained their reliance on pre-*Ernst & Ernst* and pre-*Aaron* circuit case law. *See Conn. Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 961 (2d Cir. 1987) (citing *Chris-Craft* for the proposition that "[i]t is well settled in this Circuit that scienter is a necessary element of a claim for damages under § 14(e) of the Williams Act"); *In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004) (citing *Connecticut National Bank* and *Smallwood* to hold "[w]e . . . join those circuits that hold that scienter is an element of a Section 14(e) claim"); *Flaherty &*

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that § 14(e) authorizes the SEC to promulgate rules "that prohibit acts not themselves fraudulent," which is "a power that has no parallel in Section 10(b)." *Brody v. Transitional Hospitals Corp.*, 280 F.3d 997, 1005 (9th Cir. 2002).

Crumrine Preferred Income Fund, Inc. v. TXU Corp., 565 F.3d 200, 207 (5th Cir. 2009) (citing *Smallwood* for the proposition that "[t]he elements of a claim under Section 14(e), which applies to tender offers, are identical to the Section 10(b)/Rule 10b-5 elements").

We cannot be sure how other circuits would rule were they to revisit § 14(e) in light of *Ernst & Ernst* and *Aaron*, but I question the continuing viability of the foundation for *Chris-Craft* and the cases that followed it.[3] I am persuaded that the decision we issue today is most consistent with the Supreme Court's decisions in *Ernst & Ernst* and *Aaron*.

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[3] *Chris-Craft* held that § 14(e) requires scienter because the identical language in Rule 10b-5 requires scienter. *Chris-Craft Indust., Inc.*, 480 F.2d at 362. But the earlier case that *Chris-Craft* cited for the proposition that Rule 10b-5 requires more than negligence concluded that Rule 10b-5 regulates "a standard of conduct that encompasses *negligence* as well as active fraud." *Sec. and Exchange Comm'n v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 855 (2d Cir. 1968) (emphasis added).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Gary VARJABEDIAN, on behalf of himself and all others similarly situated, Plaintiff,

v.

EMULEX CORPORATION, et al., Defendants.

Case No.: SACV 15-00554-CJC(JCGx)

Signed 01/13/2016

152 F. Supp. 3d 1226

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE.

I. INTRODUCTION

This is a putative securities class action brought by Plaintiff Gary Varjabedian against Defendants Emulex Corporation ("Emulex"), Emerald Merger Sub, Inc. ("Merger Sub"), Avago Technologies Wireless (U.S.A.) Manufacturing, Inc. ("Avago"), and ten members of Emulex's Board and management (the "Individual Defendants") (collectively, "Defendants").[1] Avago acquired Emulex in 2015 after the two companies reached a merger agreement and Merger Sub initiated a tender offer for Emulex's outstanding stock. Emulex solicited a fairness

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[1] Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Bruce C. Edwards, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari, and Dean A. Yoost.

opinion from its financial advisor, Goldman Sachs, who performed financial analyses and determined that the proposed merger, which produced a 26.4% premium over Emulex's stock price at the time, was fair to shareholders. Emulex subsequently issued a statement that summarized Goldman Sachs' findings and recommended that investors tender their shares. Emulex's statement did not mention a one-page chart Goldman Sachs had created which indicated that although Emulex's premium was within industry norms, it was also below-average. Plaintiff argues that by omitting the one-page chart from its summary of Goldman Sachs' fairness opinion, Emulex misled shareholders into believing the merger was a better deal than it actually was, in violation of federal securities laws. He brings claims under §§ 14 and 20 of the Exchange Act.

Defendants have moved to dismiss. They argue that Emulex's statements to its shareholders regarding whether they should tender their shares were not misleading, and that in any event, Plaintiff has failed to plead the required "strong inference of scienter," or that Defendants acted with "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 n.12, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). Plaintiff responds that such an inference exists because the Recommendation Statement contradicts the Premium Analysis and because Defendants' omission of the Premium Analysis demonstrates their intent to mislead shareholders. The Court disagrees. Nothing in the Recommendation Statement contradicts the information in the Premium Analysis, and Defendants' decision to omit the Premium Analysis was not "highly unreasonable" or an

"extreme departure from the standards of ordinary care" such that the Court could infer scienter from the omission alone. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir.2009). Accordingly, Plaintiff has failed to properly plead a strong inference of scienter, and Defendants' motion is GRANTED.

II. BACKGROUND

Emulex was a Delaware corporation with its headquarters in Costa Mesa, California, that provided converged networking solutions centers and sold storage adapters, network interface cards, and other products. (Dkt. 29 ["First Amended Complaint" ("FAC")] ¶ 14.) On February 25, 2015, Emulex and Avago, another technology company, issued a joint press release announcing that they had entered into a merger agreement, with Avago offering to pay $8.00 for every share of outstanding Emulex stock. (*Id.* ¶¶ 52–53.) The $8.00 price was a premium of 26.4% on Emulex's stock price the day before the merger was announced. (*Id.* ¶ 7.) Pursuant to the terms of the announced agreement, a subsidiary of Avago, Merger Sub, initiated a tender offer for Emulex's outstanding stock on April 7, 2015. (*Id.* ¶¶ 4– 5.) The tender offer expired on May 5, 2015, and Merger Sub merged into Emulex, with Emulex surviving as a wholly owned subsidiary of Avago. (*Id.* ¶ 4.)

Prior to the consummation of the merger, Emulex retained its financial advisor, Goldman Sachs, to determine whether the proposed merger agreement would be fair to shareholders from a financial point of view. Goldman Sachs determined that it would be, and provided Emulex with a number of financial analyses justifying its position. Based in part on

Goldman Sachs' opinion, on April 7, 2015, the day that Merger Sub initiated the tender offer, Emulex filed a 48–page Recommendation Statement with the Securities and Exchange Commission ("SEC") on Schedule 14D–9. (*See* Dkt. 31 Exh. A ["Recommendation Statement"] at 25.)[2] The Recommendation Statement supported the tender offer and recommended that shareholders tender their shares. It listed nine reasons for that recommendation: (1) that the value shareholders would receive in the merger "was greater than could be reasonably expected" in the future if they continued to hold Emulex stock; (2) that other available alternatives and transactions were less favorable; (3) that Emulex shareholders would receive a premium on their stock, (4) that Goldman Sachs found that the merger was fair; (5) that the cash consideration shareholders would receive was certain; (6) that the agreement provided that Emulex could back out if it received a better offer before closing; (7) that the agreement permitted Emulex to modify its recommendation; (8) that a termination fee built into the merger agreement would not preclude subsequent third party offers for Emulex; and (9) that closing conditions were appropriate. (Recommendation Statement at 22–23.)

The Recommendation Statement also included a five-page summary of Goldman Sachs' fairness opinion. The summary describes in some detail the

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[2] Defendants' request for judicial notice is GRANTED. Public SEC filings are properly subject to judicial notice and, in any event, the Recommendation Statement is incorporated by the FAC. *See U.S. v. Ritchie*, 342 F.3d 903, 908–09 (9th Cir.2003).

processes Goldman Sachs followed when rendering its opinion, and relates how four particular financial analyses—the Historical Stock Trading Analysis, the Selected Companies Analysis, the Illustrative Present Value of Future Share Price Analysis, and the Illustrative Discounted Cash Flow Analysis—supported Goldman Sachs' opinion that the merger was fair to shareholders. (Recommendation Statement at 27–29.)

Among the other financial analyses Goldman Sachs produced for Defendants was a one-page chart called "Selected Semiconductor Transactions," and which the parties refer to as the "Premium Analysis." (*See* FAC at p. 35.) The Premium Analysis "selected certain transactions in the industry" that Goldman Sachs deemed most similar to the proposed merger between Avago and Emulex, and "reviewed the respective premiums stockholders received in those transactions compared to" the premium Emulex's stockholders were due to receive. (FAC ¶¶ 137–38.) Altogether the Premium Analysis collected 17 transactions involving a semiconductor company between 2010 and 2014. Comparing Emulex's premium—26.4%—with the premiums listed in the Premium Analysis indicates that although Emulex's premium fell within the normal range of semiconductor merger premiums, it was below-average. (*Id.* at p. 35.) Goldman Sachs' opinion was that the merger was fair despite a below-average premium, and Defendants elected not to summarize the one-page Premium Analysis in the fairness opinion summary they included in the Recommendation Statement. Plaintiff alleges that this failure violates the federal securities laws.

One day after the Recommendation Statement was published, Plaintiff filed his original complaint. After obtaining limited expedited discovery, Plaintiff filed his FAC on September 17, 2015, alleging violations of §§ 14 an 20 of the Exchange Act. (*See generally* FAC.) Defendants moved to dismiss for failure to state a claim on October 13, 2015. (Dkt.30.)

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir.1997). Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2). When evaluating a Rule 12(b)(6) motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir.1994). The district court may also consider additional facts in materials that the district court may take judicial notice, *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir.1994), as well as "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading," *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994), *overruled in part on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir.2002). However, "the tenet that a

court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (stating that while a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" (citations and quotes omitted)). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995).

IV. ANALYSIS

A. Section 14(e) Cause of Action

Plaintiff's first cause of action is for violations of § 14(e) of the Exchange Act, which makes it unlawful to "make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading . . . in connection with any tender offer." 15 U.S.C. § 78n(e). Defendants move to dismiss Plaintiff's § 14(e) cause of action on the ground that Plaintiff has failed to allege that Defendants acted

with the scienter necessary to state a claim under § 14(e).[3]

The parties dispute whether Plaintiff is required to plead that Defendants acted with scienter to allege a claim under § 14(e). "[E]ven though the Ninth Circuit has not decided the issue regarding the scienter required under section 14(e), the majority of other circuits and districts to address the issue have held that . . . scienter [is] required under section 14(e)[.]" *Rubke v. Capitol Bancorp Ltd.*, 460 F.Supp.2d 1124, 1150 (N.D.Cal.2006) (collecting cases); *see also Dixon v. Cost Plus*, Case No. 12–CV–02721–LHK, 2012 WL 2499931, at *6 (N.D.Cal. June 27, 2012) ("Under Section 14(e) of the Securities and Exchange Act, Plaintiff must show that Defendants made a material misrepresentation or omission with scienter in connection with a tender offer.") The courts that have concluded that § 14(e) claims require a showing of scienter have generally reasoned as follows: § 14(e) is "modeled on the antifraud provisions of § 10(b) of the ['34] Act and Rule 10b–5," *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 10, 105 S.Ct. 2458, 86 L.Ed.2d 1 (1985), and those provisions require proof of scienter, *Ernst & Ernst v. Hochfelder*, 425 U.S. at 193, 96 S.Ct. 1375, so § 14(e) claims should also require scienter.

The parallels between the two provisions are obvious: Rule 10b–5 prohibits individuals from, in

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[3] Defendants also move to dismiss the FAC on the ground that the Premium Analysis was not material. *See* § 14(e) (making it unlawful to "omit to state any *material* fact necessary . . .). Because the Court is disposing with this action on the ground that Plaintiff has not pleaded scienter, there is no need to reach the question of whether he has properly pleaded materiality.

certain circumstances, "mak[ing] any untrue statement of a material fact or . . . omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b–5. Section 14(e) uses identical language. 15 U.S.C. § 78n(e). Courts have looked to this parallel to hold unanimously that § 14(e) claims require proof of scienter. *See, e.g., In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir.2004) ("We . . . join those circuits that hold that scienter is an element of a Section 14(e) claim . . . [b]ecause of the similarity in the language and scope of Section 14(e) and Rule 10b–5"); *Flaherty v. Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207 (5th Cir.2009) ("The elements of a claim under Section 14(e), which applies to tender offers, are identical to the Section 10(b)/Rule 10b–5 elements," including scienter.); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 431 (6th Cir. 1980) ("Congress envisioned scienter to be an element of 14(e).").

Plaintiff contends that he should not have to allege scienter for his § 14(e) claim—only negligence—and that those courts that have concluded that § 14(e) claims require proof of scienter have erred. To support this position, Plaintiff constructs an elaborate argument involving the stated legislative purpose of section 14(e), analogies to other federal securities laws, and citations to the academic literature. (See Dkt. 38 at 10–15.) In its essence, the argument goes like this: § 14(e) contains two clauses, one of which is patterned after Rule 10b–5 (which requires scienter), and one of which is patterned after § 17(a)(2), (which does not, see *Aaron v. SEC*, 446 U.S. 680, 701, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980)).

Accordingly—Plaintiff argues—claims brought under the § 14(e) clause resembling § 17(a)(2) should not require a showing of scienter. Finally, Plaintiff asserts that reading § 14(e) to *not* require scienter is consistent with the statute's legislative intent—to ensure that stockholders have adequate information when responding to a tender offer.

This argument is not entirely without merit, but Plaintiff has cited no case law adopting his novel view of § 14(e). So far as Plaintiff has alleged, and so far as the Court can determine, *no* federal court has held that § 14(e) requires only a showing of negligence. Considering the wealth of persuasive case law to the contrary, the Court concludes that the better view is that the similarities between Rule 10b–5 and § 14(e) require a plaintiff bringing a cause of action under § 14(e) to allege scienter.

To adequately demonstrate that a defendant acted with scienter in a securities fraud case, "a complaint must allege that the defendants made false or misleading statements either intentionally or with deliberate recklessness." *Zucco Partners*, 552 F.3d at 991.[4] Importantly, the standard for pleading scienter in the context of securities fraud is atypical. Rather than simply allege some facts that plausibly suggest scienter, the Private Securities Litigation Reform Act ("PSLRA") requires Plaintiff to satisfy an unusually high standard: he must "plead facts evincing a *strong*

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[4] Plaintiff is required to allege both falsity and scienter. The Ninth Circuit has noted that allegations of falsity and scienter "involve the same set of facts" and so "can be collapsed into a single inquiry." *No. 84 Employer–Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 932 (9th Cir.2003). Accordingly, this order considers falsity and scienter together.

inference of scienter in order to survive a motion to dismiss." *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002) (emphasis added). The Ninth Circuit has explained that this requirement is designed to "eliminate abusive and opportunistic securities litigation and to put an end to the practice of pleading fraud by hindsight." *Id.* at 897. When determining whether a plaintiff has met the strong inference standard, the district court "must consider all reasonable inferences to be drawn from the allegations, including inferences unfavorable to plaintiffs." *Id.* at 897. Plaintiff's allegations regarding scienter can survive Defendants' motion to dismiss "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the alleged facts." *Biotechnology Value Fund, LP v. Celera Corp.*, 12 F.Supp.3d 1194, 1200–01 (N.D.Cal.2013). In other words, the Supreme Court has explained, "[t]he reviewing court must ask: When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?" *Tellabs, Inc. v. Makor Issues and Rights, Ltd.*, 551 U.S. 308, 326, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007).

In the Ninth Circuit, district courts employ a "dual inquiry" to determine whether a plaintiff has pleaded a strong inference of scienter. *Zucco Partners*, 552 F.3d at 992. First, the court "determine[s] whether any of the plaintiff's allegations, standing alone, are sufficient to create a strong inference of scienter." *Id.* The Ninth Circuit has described this step as "segmented" and noted that Supreme Court has "call[ed] into question" whether an analysis that

"relies exclusively on a segmented analysis of scienter" is sufficient. *Id.* at 991. Accordingly, "if no individual allegations are sufficient," the court proceeds to the second step and conducts a "holistic review of the same allegations to determine whether the insufficient allegations combine to create a strong inference of intentional conduct or deliberate recklessness." *Id.* at 992.

Plaintiff argues that he has alleged a strong inference of scienter in at least three different ways. First, he says, Defendants made misleading statements regarding Emulex premiums despite having access to contradictory information—namely, the Premium Analysis. Second, Plaintiff argues that Defendants knew of the Premium Analysis and failed to reveal it to investors, knowing that keeping the information from the investors would mislead them, and that this alone suggests that Defendants acted with scienter. Finally, Plaintiff argues that the Individual Defendants had a motive and opportunity to commit fraud because they feared they would lose their jobs if Emulex did not sell quickly and because they wanted to tout that they had successfully sold Emulex at a premium, knowing that doing so would help their individual reputations. In fact, Plaintiff's allegations of scienter fail for two independent reasons. First, Defendants' statements or omissions were not in fact false. And second, Defendant has not alleged facts leading to a strong inference that Defendants intended to deceive or mislead Plaintiff and the other shareholders by omitting the Premium Analysis.

i. Contradictory Information

As one of its reasons for recommending that shareholders tender their shares, Emulex noted in the Recommendation Statement that the offer price of $8.00 per share "represented . . a premium of 26.4% to the closing sale[ ] price [on the day before the merger agreement was executed]; a premium of 24.0% based on the 30–day average [of Emulex's stock price], a premium of 32.9% based on the 90–day average [of that stock price]; a premium of 4.8% based on the 52–week high [of the stock price]; a premium of 79.4% based on the 52–week low [of the stock price]; and a premium of 33.3% based on the International Brokers' Estimate System median price target [of the stock]." (Recommendation Statement at 25–26.) Plaintiff alleges that these statements were "materially misleading" because they suggested to Emulex's stockholders that the premium they would receive for their shares was significant. (FAC ¶ 8.) In reality, Plaintiff says, "the premium was drastically below the premiums stockholders had received in connection with similar merger transactions in recent years." (*Id.*) Defendants respond by arguing that the statements were not misleading because they did not create any impression of how the premiums Emulex stockholders would receive related to the premiums stockholders of other companies had received, even in comparable transactions. Moreover, Defendants point out, although the Emulex premiums were below the reported means and medians of the transactions that Goldman Sachs decided to include in the Premium Analysis, Emulex's premiums also fall *within* the range of premiums listed in the analysis.

Plaintiff is correct that an inference of scienter may exist when a defendant makes an affirmative, misleading statement despite having access to contradictory information. *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1230 (9th Cir.2004) ("The most direct way to show both that a statement was false when made and that the party making the statement knew it was false is via contemporaneous reports or data, available to the party, which contradict the statement.") But that is not what happened here. The Recommendation Statement reports that Emulex stockholders were going to receive a premium on their stock and that Emulex believed that the premium was a reason to tender shares. The Premium Analysis reports that the Emulex premium was below-average for the industry but within a reasonable range of outcomes. [5]

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[5] Seventeen transactions conducted between 2011 and 2014 were surveyed in the Premium Analysis. The Emulex premium over its sale price as of the announcement—26.4%—is higher than four than that of the surveyed transactions, and lower than 13. (Recommendation Statement at 25.) The Emulex premium over the 52–week high price of Emulex stock—4.8%—is higher than four of the surveyed transactions, and lower than 10 (fewer data was available for 52–week highs). (*Id.*) When compared against only the 2014 transactions in the Premium Analysis, Emulex's 26.4% sale price premium would have rated sixth out of nine, and its 4.8% 52–week premium would have rated fifth out of seven. (*Id.*) In other words, although Emulex's premiums are in the bottom half of the distribution, they are decidedly within the normal range of transactions, and not "drastically below the premium stockholders of similar companies had received in connection with comparable transactions," as Plaintiff alleges, (FAC ¶ 7.) Additionally, the Premium Analysis does not contain any *analysis*—that is, any explanation of why Emulex's merger with Avago is more or less like any of the listed examples, or where in

These statements are not contradictory. The Recommendation Statement creates no impression in the reasonable reader that the Emulex premiums were either higher or lower than the average premiums in the industry.[6] And the Premium Analysis does not say that only above-average premiums are a reason to tender shares. No doubt many stockholders were delighted to receive a 26% premium on their shares.[7]

Plaintiff cites several cases in an attempt to shore up his argument that Defendants' recommendation based on premium amount is sufficient to support a strong inference of scienter. But each of Plaintiff's cases is distinguishable from the facts here. In *Reese v. Malone,* for example, the defendant oil company spilled 200,000 gallons of oil onto the Alaskan tundra

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the distribution Emulex's premium should be expected to fall. Goldman Sachs was evidently not troubled by the Premium Analysis, determining that the $8.00 was fair to investors from a financial standpoint.

[6] In fact, the Recommendation Statement deliberately hedges by noting that its summary of Goldman Sachs' fairness opinion "does not purport to be a complete description of the analyses performed by Godman Sachs in connection with its opinion and is qualified in its entirety by reference to the full text of the written opinion of Goldman Sachs included as Annex A to this Statement." (Recommendation Statement at 29.)

[7] Moreover, the practical upshot of Plaintiff's argument is troubling. If the Court were to find a strong inference of scienter from these facts alone, it would mean that for any merger that produces a below-median premium (in other words, exactly half of all mergers), a target company may not report a premium amount as a reason to tender shares without saying exactly where in the distribution its merger premium falls. This would essentially convert the scienter element of § 14(e)'s antifraud provisions into an affirmative reporting requirement.

when a pipeline developed a leak. 747 F.3d 557, 563 (9th Cir.2014). The company and its directors subsequently made a number of public statements reassuring investors that the faulty pipeline was anomalous and that the company's other pipelines were in good condition. In fact, the company's data indicated that the leaky pipeline was in comparable condition to other pipelines, suggesting that the company should have been more worried about future leaks. Sure enough, another pipeline sprung a leak a few months later, and investors brought suit. The Ninth Circuit found that a director's "detailed factual statement, contradicting important data to which she had access," gave rise to a strong inference of scienter. *Id.* at 572. Here, by contrast, no similar contradiction exists. Emulex did not say its premiums were above-average—only that they were a reason to tender shares. And the Premium Analysis does not say that the premiums were not a reason to tender shares—only that they were below-average. That is not a contradiction.

Similar problems exist with Plaintiff's citation to *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 987 (9th Cir.2008). There, a company performed contracted work for the federal government, although the government would occasionally issue "stop-work" orders, following which the company was required to halt work and would receive no future income on the project unless work resumed. Work almost never resumed after stop-work orders, but the company continued counting work on contracts that had been stopped within its "backlog," or tally of pending work. The Ninth Circuit concluded that doing so gave rise to a strong inference of scienter, since the company knew the work was very unlikely to resume yet

represented to investors that the work was in the company's queue. *Id.* at 988–89. No comparable allegations exist here, since Emulex's statements do not contradict any knowledge it or its directors had. Plaintiff's other cases are similarly distinguishable. *See Siemers v. Wells Fargo & Co.*, No. C 05–04518, 2007 WL 1140660, at *12 (N.D.Cal. Apr. 17, 2007) (holding that a strong inference of scienter existed when a defendant knew about, but failed to disclose, a "vast and secret program of revenue sharing" while making false statements to the contrary); *Schlagal v. Learning Tree Int'l*, No. CV 98–6384 ABC (Ex), 1998 WL 1144581, at *2 (C.D.Cal. Dec. 23, 1998) (inferring scienter when defendants misstated earnings figures, among other things, despite having access to the true numbers).

Simply put, Plaintiff has not demonstrated that anything in Emulex's Recommendation Statement contradicted the Premium Analysis. Emulex did not represent in the Recommendation Statement that its 26.4% premium was above average. It only expressed its belief that the premium was fair and a reason for shareholders to tender their shares.

ii. Failure to Disclose a Potentially Material Fact

Plaintiff's second scienter argument is that he has raised a strong inference of scienter by alleging that Defendants failed to reveal a potentially material fact—the Premium Analysis—knowing that such a failure would likely mislead shareholders. In the Ninth Circuit, to successfully plead scienter based on an omission, a "plaintiff must plead a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme

departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Zucco Partners*, 552 F.3d at 991. This standard is extremely difficult to meet, because even clear misconduct does not always raise a strong inference of scienter. *In re NVIDIA Corp. Sec. Litig.*, No. C 08–04260 RS, 2011 WL 4831192, at *8 (N.D.Cal. Oct. 12, 2011), *affirmed, In re NVIDIA Corp.*, 768 F.3d 1046, 1046 (9th Cir.2014) (finding no strong inference of scienter even when a company knew of a significant product defect and failed to disclose it to investors, since "[s]uch behavior, at worst, reflects recklessness in the ordinary sense of the word"); *see also In re XenoPort, Inc. Securities Litig.*, No. C–10–03301 RMW, 2011 WL 6153134, at *4, 6 (N.D.Cal. Dec. 12, 2011) (holding that although a plaintiff successfully pleaded that the defendant misled investors by failing to disclose important differences between two drugs, a "strong inference of scienter" was not warranted because the failure was not a "highly unreasonable omission").

Here, Plaintiff argues that the simple omission of the Premium Analysis alone raises an inference of scienter. The Court is not persuaded. To begin with, the mere omission of information from a fairness opinion summary cannot alone justify an inference of scienter without a showing that the *content* of the omitted material renders the omission "an extreme departure from the standards of ordinary care," *see Zucco Partners*, 552 F.3d at 991. After all, a fairness opinion summary is just that–a summary–which cannot be expected to include every relevant or meaningful bit of analysis performed by a financial

advisor. Indeed, investors would be done great harm if companies dumped entire financial analyses into recommendation statements and expected investors to sift through the mess. This Court has observed that "just because a particular analysis was worth considering by the board does not mean that is material to a reasonable investor" and therefore must be contained within a summary. *Masters v. Avanir Pharm., Inc.*, 996 F.Supp.2d 872, 885 (C.D.Cal.2014). The very fact that Plaintiff is attacking a *summary* of a fairness opinion casts doubt on his assertion that Defendants were intending to deceive investors as they undertook the task of determining what information was worth including in the summary and what information was not.

A better explanation is that Defendants realized that the Premium Analysis was minor in the scheme of the voluminous analysis performed by Goldman Sachs, and that the Premium Analysis's substance—that the Emulex premiums were below-average but otherwise ordinary for the industry—was unremarkable. Indeed, there are good reasons to doubt that the Premium Analysis says anything significant about the merits of the Emulex/Avago merger. For example, as the Recommendation Statement describes, Goldman Sachs went to considerable lengths to conduct a Selected Companies Analysis, which compared Emulex with a list of companies "chosen because they are publicly traded companies with operations that, for purposes of analysis, may be considered similar to certain operations of Emulex." (Recommendation Statement at 27.) But none of the companies in the Selected Companies Analysis appear on the Premium Analysis (*i.e.*, they were not among the companies involved in

the mergers described in the chart). Defendants may have simply concluded that because none of the companies very similar to Emulex were listed on the Premium Analysis, the mergers in that analysis were not similar enough to the Avago/Emulex merger to convey useful information about the premium—at least not useful enough to include in a summary of all the financial analysis Goldman Sachs performed. Moreover, even if the Court were to assume that the Premium Analysis was important, the fact of the matter is that the Emulex premium falls well within the range of premiums listed in the Premium Analysis. No doubt some investors would have found the Premium Analysis interesting and useful. But the utility of that analysis is in question, and the Court cannot say that it was an extreme departure from the standards of ordinary care to leave it out.

What to include in a fairness opinion summary is a judgment call. The Premium Analysis evidently did not trouble Goldman Sachs, who determined that the deal was fair despite knowing that the premium it produced was below-average. And there is no reason to believe that it troubled the Defendants—much less that it troubled them so much that they kept it from investors in an attempt to deceive them. Instead, what appears to have happened here is Plaintiff, having obtained limited discovery, scoured the financial analysis performed by Goldman Sachs looking for anything negative about the merger that did not appear in the Recommendation Statement. He has come up only with the Premium Analysis—a one-page chart demonstrating that a single element of the merger (the premium) was below-average when compared with other selected mergers. The exclusion of that chart from the fairness opinion summary was

not highly unreasonable and therefore does not give rise to a strong inference of scienter.

iii. Motive and Opportunity to Commit Fraud

Finally, Plaintiff alleges that a strong inference of scienter exists because the Individual Defendants were motivated to commit fraud by persuading shareholders to tender offers despite an inadequate premium. The facts Plaintiff alleges to support this theory are as follows: activist investors began pressuring Emulex's Board to sell the company in 2012, with two activist hedge funds in particular jockeying to place individuals on the Board and demanding "wholesale change at the Board level." (*See* FAC ¶¶ 60–67.) Ultimately two senior officers resigned and Board membership was expanded. (*Id.* ¶¶ 62; 69–70.) Plaintiff posits that other members of the Board feared for their jobs and ultimately decided to sell Emulex at a discount rather than face the "embarrassment of losing their jobs" as the activist investors continued to pursue Board change. (*Id.* ¶¶ 74, 133.) After receiving two "inadequate" proposals from private equity firms, Plaintiff alleges, the Board reached out to Avago and ultimately agreed to the merger at an unfair price. (*Id.* ¶¶ 80; 137.)

Plaintiff argues that these facts support a strong inference of scienter because the Individual Defendants figured that they were going to lose their jobs one way or another—either at the hands of the activist investors or by selling the company. Knowing that selling the company would be better for their reputations than getting kicked off the Board, the Individual Defendants resolved to the sell the company even if it meant duping shareholders as to

what a fair price for Emulex stock was. The problems with using this rationale as an inference of scienter are obvious. For one thing, *all* executives would like to enhance their reputations and conduct successful transactions; that does not mean that all executives have a quasi-permanent motive for securities fraud. A number of courts have so reasoned, including the Ninth Circuit. *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1038 (9th Cir.2002) ("If scienter could be pleaded merely by alleging that officers and directors possess motive and opportunity to enhance a company's business prospects, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions."); *see also O'Connell v. Arthur Andersen LLP (In re AlphaStar Ins. Group Ltd.)*, 383 B.R. 231, 259 (Bankr.S.D.N.Y.2008) ("Every businessperson is concerned about his reputation. The motive to protect a business reputation is, therefore, too general to satisfy the pleading requirement for scienter."); *In re Moody's Corp. Securities Litig.*, 599 F.Supp.2d 493, 515 (S.D.N.Y.2009) ("Nor does the preservation of reputation constitute a cognizable motive for fraud."). As Defendants persuasively argue, "[e]very board member in America cannot start with one or two legal strikes in the scienter column based on a boilerplate accusation that she cares more about her reputation in the business world than shareholder welfare." (Dkt. 39 at 10.)

But even if it were realistic to use a board member's desire to pad his or her resume as a motive for fraud, there are compelling facts to suggest that the Board did not act in an effort to defraud shareholders and save their reputations. For one,

Plaintiff acknowledges that activist pressure began more than *two years* before Emulex was sold; this delay does not square with Plaintiff's assertion that the Board sold Emulex in a rush to save face. Additionally, Plaintiff ignores that the Individual Defendants held significant amounts of Emulex stock and therefore had as much to lose as any shareholder from sale at an unfair price. Finally, Plaintiff himself alleges that Defendants rejected two inadequate proposals from private equity firms before approaching Avago, (FAC ¶ 78), who Plaintiff notes was "much more likely to submit [a] higher proposal[ ]" that the private equity firms, (*id.* ¶ 79). These facts are difficult to reconcile with Plaintiff's current argument that Defendants were desperate to sell at any price in order to avoid losing their jobs. In short, Plaintiff's allegations of motive and opportunity on the part of the Individual Defendants do not give rise to a strong inference of scienter.[8]

4. Holistic Analysis

Having concluded that none of Plaintiff's individual arguments establish a strong inference of scienter, the Court is now required to "consider the complaint in its entirety to determine whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter . . . tak[ing] into account plausible opposing inferences." *Zucco Partners*, 552 F.3d at 1006. The Court finds that a strong inference

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[8] Plaintiff also alleges, in passing, that it has adequately pleaded scienter on the part of one of the Individual Defendants, Gregory S. Clark, because he "represented the interests of hedge fund Elliott Associates." (Dkt. 38 at 21.) Mere association with an activist investor cannot alone justify a strong inference of scienter.

of scienter is not warranted. Accepting the factual allegations of the complaint as true, Plaintiff essentially alleges that Defendants left an important financial analysis out of a fairness opinion summary in the Recommendation Statement, misleading stockholders into believing that the tender offer was a good deal when it was in fact a bad one. But Plaintiff's efforts to show that Defendants did so with "at a minimum, *deliberate* recklessness," *In re NVIDIA*, 768 F.3d at 1053, boil down to inferences that are less plausible than innocent alternatives. It *may* be true, as Defendants argue, that the Defendants deliberately hoodwinked investors by concealing the Premium Analysis. But it is certainly more likely true that Defendants legitimately believed the premium the merger would deliver to shareholders was a fair one, and that the Premium Analysis did not indicate otherwise (after all, Defendants could not reasonably include every piece of the fairness opinion in the Recommendation Statement, and the Emulex premiums fell within the range indicated on the Premium Analysis). Similarly, Plaintiff's story of how beleaguered Board members sought to sell Emulex quickly to shore up their reputations is not totally implausible, but even combined with the other facts Plaintiff alleges, it is not a good reason to believe that Defendants deliberately bamboozled shareholders by concealing the Premium Analysis.

Additionally, some of Plaintiff's allegations of scienter undermine each other. For example, as evidence for his claim that Emulex's directors accepted a lowball offer for the company to protect their reputations, Plaintiff points to the LinkedIn profile of one of the directors, which boasts that the

director worked to negotiate the merger, which delivered "a 26% premium over current stock price." (Dkt.38–6.) Assuming, without deciding, that this evidence is appropriate for judicial notice, it seems to actually cut exactly *against* an inference of scienter by undermining Plaintiff's other scienter allegations.[9] At one turn, Plaintiff asks the Court to infer scienter because, as Plaintiff tells it, the directors were so embarrassed that Emulex's premium price was below the industry median that they refused to disclose (publicly available) industry norms to shareholders. Yet Plaintiff simultaneously argues that the directors touted the premium price online to boost their reputations, and that the Court should take this as evidence that they acted with scienter. In fact, it is good evidence that they were *not* so troubled by how low the premium was that they deliberately defrauded shareholders by concealing the Premium Analysis. This contradiction is a good example of how Plaintiff's hodgepodge of scienter allegations do not holistically add up to a strong inference that Defendants acted with the requisite state of mind.

When Congress elected to require a "strong inference of scienter" in securities fraud cases, it set the pleading bar deliberately high in securities fraud cases. Plaintiff has not met that heightened pleading bar, and his § 14(e) claim is DISMISSED.

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[9] Defendants objected to Plaintiff's request for judicial notice, but then withdrew their objection at the hearing the Court held on this motion. The Court GRANTS Plaintiff's request for judicial notice as to certain SEC filings, including a single filing from a separate merger which includes a premium analysis like the one Plaintiff believe was wrongfully omitted here. (Dkt. 38 Exhs. 1, 2, 6.) A single filing from another case is not evidence of materiality, much less of falsity or scienter.

B. Plaintiff's Other Securities Claims

Plaintiff's next claim is for a violation of § 14(d)(4) and Rule 14d–9. Section 14(d)(4) provides that "[a]ny solicitation or recommendation to the holders of . . . a security to accept or reject a tender offer . . . shall be made in accordance with [the] rules and regulations [of the SEC]." 15 U.S.C. § 78n(d)(4). Rule 14d–9 in turn specifies that one of those rules is that recommendation statements "shall include . . . information required by Items 1 through 8 of Schedule 14D–9 or a fair and adequate summary thereof." 17 C.F.R. § 240.14d–9(d). Finally, Item 8 on Schedule 14D–9 requires a company's directors to furnish "information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading." *See* 17 C.F.R. § 240.14d–101; 17 C.F.R. § 229.1011. Using these provisions in tandem, Plaintiff argues that by omitting the Premium Analysis, Defendants misled investors, therefore breaching Rule 14d–9 and, in turn, violating § 14(d)(4). Defendant responds by arguing that there is no private right of action under § 14(d)(4).

Every federal court to consider the question whether § 14(d)(4) establishes a private right of action has concluded that it does not. *Dixon,* 2012 WL 2499931 at *6 n.2 ("Plaintiff also purports to bring a Section 14(d)(4) claim, but that provision does not give rise to a private right of action."); *McCreary v. Celera Corp.*, No. 11–1618 SC, 2011 WL 1399263, at *3 n.1 (N.D.Cal. Apr. 13, 2011) (same); *Washburn v. Madison Square Garden Corp.*, 340 F.Supp. 504, 508 (S.D.N.Y.1972) ("Here again, we are cited no case granting a private right of action under [§ 14(d)(4)]."). The parties agree that § 14(d)(4) does not *expressly*

create a private right of action, but Plaintiff argues that this Court should break from the above authorities and hold that that section creates an *implied* right of action. He points out that the Ninth Circuit has found that at least one other subsection of § 14(d) does create a implied private right of action—§ 14(d)(7)—and asks that the Court do the same here. *Epstein v. MCA, Inc.*, 50 F.3d 644, 649–52 (9th Cir.1995), *reversed on other grounds, Matsushita Elec. Indus. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996).

Although Plaintiff does not attempt to apply it, the traditional analysis for determining whether a federal statute creates an implied right of action is a test set forth in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). That test requires courts to ask four questions:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally regulated to state law . . . ?

Id. (internal citations omitted). The fourth Cort factor—whether a cause of action is traditionally regulated to state law—does not apply here, in the federal securities context. But the remaining three Cort factors weigh against implying a private right of action. First, § 14(d)(4) focuses not on the

shareholders ostensibly being protected by recommendation statements, but on the companies who are actually required to make those statements. *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.") (internal citations omitted). The statute does require that recommendation statements abide by SEC rules that are "appropriate in the public interest or for the protection of investors." § 14(d)(4). But just because certain rules exist to protect investors does not mean that individuals have a private right of action to enforce a *statute* that requires companies' recommendation statements to abide by those rules. By contrast, § 14(d)(7), which the Ninth Circuit has held *does* create an implied private right of action, explicitly provides for payment to individual security holders, and therefore focuses on a class of persons benefiting from protection, and not a class of entities being regulated. *See* § 14(d)(7) ("When any person varies the terms of a tender offer . . . before the expiration thereof . . . such person shall pay the increased consideration to each security holder whose securities are taken up and paid for[.]")

Second, there is no indication of any legislative intent to provide for a private right of action. Section 14(d)(4) is a generic statute simply requiring that recommendation statements abide by the SEC's rules. If anything, the statute presumes SEC—not private—enforcement. And finally, it would be inconsistent with the scheme of § 14 to imply a private right of action from § 14(d)(4). Section 14 already has a provision providing for a private right of action to sue

over material misrepresentations or omissions in recommendation statements: § 14(e). It would make little sense to look to § 14(d)(4)—a more general subsection—in an effort to cover the same ground. Plaintiff is candid about his reasons for attempting to wring a private right of action out of § 14(d)(4): he believes that claims under that subsection would only be required to plead negligence, and not scienter. But this argument cuts directly against finding a private right of action in § 14(d)(4). Why would Congress permit individuals to sue over misrepresentations and omissions in recommendation statements under § 14(e)—while requiring scienter—but then intend for the same individuals to bring parallel actions under § 14(d)(4) without the scienter requirement? There is no reason to believe that Congress intended that private individuals be permitted to sue under § 14(d)(4) and good reasons to believe otherwise. As the *Cort* factors weigh against finding a private right of action, the Court concludes that § 14(d)(4) does not create such a right, and Plaintiff's § 14(d)(4) claim is DISMISSED WITH PREJUDICE.

Finally, Plaintiff's § 20(a) claim fails because "to establish a cause of action under [§ 20(a)], a plaintiff must first prove a primary violation of underlying securities laws." *In re NVIDIA*, 768 F.3d at 1052. Plaintiff has not successfully alleged a violation of federal securities law, so his § 20(a) claim fails.

C. Futility of Granting Leave to Amend

Although the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations, *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995), the district court need not grant leave to amend if

amendment of the complaint would be futile. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051–52 (9th Cir.2008) (finding that amendment would be futile where plaintiff was granted leave to amend once and the amended complaint contained the same defects as the prior complaint). Here, although Plaintiff requested leave to amend should Defendants' motion be granted, the Court sees no reason to grant such leave. Plaintiff has already obtained expedited discovery and filed an amended complaint. *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 391 (9th Cir.2002) (affirming district court's denial of leave to amend where plaintiffs in a securities fraud case failed to adequately allege scienter in an amended complaint). At the hearing on Defendants' motion, Plaintiff's counsel did not identify any facts nor offer any reason to believe that Plaintiff could allege any facts beyond what is currently in the FAC and the materials of which Plaintiff requested judicial notice, despite a direct question from the Court on the issue. Plaintiff has already put his best foot forward with regard to scienter and failed to adequately allege scienter in his amended complaint. It would be a pointless exercise and an unnecessary waste of the parties' resources to permit Plaintiff to file yet another amended complaint. This is especially true given the heightened pleading standard of PSLRA. *In re VISX, Inc. Securities Litig.*, No. C 00–0649 CRB, 2001 WL 210481, at *11 (N.D.Cal. Feb. 27, 2011) (denying leave to amend where plaintiffs had "not identified any additional facts that would provide plaintiffs' allegations of scienter the strength needed to satisfy

the PSLRA").[10] Plaintiff has not alleged, and cannot allege, a claim for securities fraud based on Defendants' failure to disclose the Premium Analysis in connection with the Recommendation Statement.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion is GRANTED, and Plaintiff's claims are DISMISSED WITH PREJUDICE.

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[10] Judge Breyer also denied leave to amend in *In re VISX, Inc.* because plaintiffs were "represented by experience securities fraud class action counsel who are intimately familiar with the PSLRA and the Ninth Circuit's stringent interpretation of its pleading standards," and because plaintiffs in that case amended their complaint "more than five months after the original lawsuits were filed." *In re VISX*, 2001 WL 210481, at *11. Both of these rationales are present here as well; Plaintiff is represented by competent securities counsel who understand the uphill battle of pleading scienter, and Plaintiff's amended complaint was filed on September 17, 2015, more than five months after he filed his original complaint in April. (*See* Dkt. 1; Dkt. 29.)

FILED
SEP 6 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY VARJABEDIAN, Plaintiff-Appellant, v. EMULEX CORPORATION; BRUCE C. EDWARDS; JEFFREY W. BENCK; GREGORY S. CLARK; GARY J. DAICHENDT; PAUL F. FOLINO; BEATRIZ V. INFANTE; JOHN A. KELLEY; RAHUL N. MERCHANT; NERSI NAZARI; DEAN A. YOOST; AVAGO TECHNOLOGIES WIRELESS (USA) MANUFACTURING, INC.; EMERALD MERGER SUB, INC., Defendants-Appellees.	No. 16-55088 D.C. No. 8:15-cv-00554-CJC-JCG Central District of California, Santa Ana ORDER

Before GRABER, MURGUIA, and CHRISTEN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED (Docs. 63, 64).

FILED
SEP 14 2018
MOLLY C. DWYER, CLERK
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY VARJABEDIAN, Plaintiff-Appellant, v. EMULEX CORPORATION; BRUCE C. EDWARDS; JEFFREY W. BENCK; GREGORY S. CLARK; GARY J. DAICHENDT; PAUL F. FOLINO; BEATRIZ V. INFANTE; JOHN A. KELLEY; RAHUL N. MERCHANT; NERSI NAZARI; DEAN A. YOOST; AVAGO TECHNOLOGIES WIRELESS (USA) MANUFACTURING, INC.; EMERALD MERGER SUB, INC., Defendants-Appellees.	No. 16-55088 D.C. No. 8:15-cv-00554-CJC-JCG Central District of California, Santa Ana ORDER

Before GRABER, MURGUIA, and CHRISTEN, Circuit Judges.

Appellees' motion for stay of mandate pending filing of petition for writ of certiorari is GRANTED (Doc. 76). Fed. R. App. P. 41(b).

The mandate is stayed for ninety (90) days pending the Appellees' filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, the stay shall continue until final disposition by the Supreme Court.

Section 17(a) of the Securities Act of 1933

15 U.S.C. § 77q(a)

§ 77q. Fraudulent interstate transactions

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * *

Section 10(b) of the Securities Exchange Act of 1934

15 U.S.C. § 78j(b)

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

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[1] So in original. Probably should be followed by a comma.

Section 14(3) of the Securities Exchange Act of 1934

15 U.S.C. § 78n(e)

§ 78n. Proxies

* * *

(e) Untrue statement of material fact or omission of fact with respect to tender offer

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

* * *

17 C.F.R. § 240.10b–5

§ 240.10b–5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

No. 18-459

In the Supreme Court of the United States

EMULEX CORPORATION, ET AL., PETITIONERS

v.

GARY VARJABEDIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), sets out two distinct forms of liability "in connection with any tender offer." Its first clause makes it "unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." Its second clause makes it "unlawful for any person * * * to engage in any fraudulent, deceptive, or manipulative acts or practices."

Consistent with its plain text, this Court has twice construed language materially indistinguishable from the first clause to require a showing of negligence, not scienter. And this Court has also confirmed that where, as here, a statute separates two clauses with the disjunctive (declaring it "unlawful" to violate the first clause "or" the second), each clause can retain its own distinct culpability requirement.

The question presented is:

Whether an action premised solely on Section 14(e)'s first clause, not its second, requires a pleading of scienter to state a claim.

PARTIES TO THE PROCEEDING BELOW

Petitioners are Emulex Corporation; Bruce C. Edwards; Jeffrey W. Benck; Gregory S. Clark; Gary J. Daichendt; Paul F. Folino; Beatriz V. Infante; John A. Kelley; Rahul N. Merchant; Nersi Nazari; Dean A. Yoost; Avago Technologies Wireless (USA) Manufacturing, Inc.; and Emerald Merger Sub, Inc.

Respondents are Gary Varjabedian and Jerry Mutza. Mr. Varjabedian filed the initial complaint in this case, but the district court ultimately appointed Mr. Mutza as lead plaintiff for the class. See Pet. App. 1a n.1.

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L. Loss, et al., *Fundamentals of Securities Regulation* (5th ed. 2004) 16
3 L. Loss, *Securities Regulation* (2d ed. 1961) 15
Stephen M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 30
U.S. Courts, *Federal Judicial Caseload Statistics 2018* <https://tinyurl.com/2017-dct-stats> 26

In the Supreme Court of the United States

No. 18-459

EMULEX CORPORATION, ET AL., PETITIONERS

v.

GARY VARJABEDIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 888 F.3d 399. The order and opinion of the district court (Pet. App. 27a-57a) is reported at 152 F. Supp. 3d 1226.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2018. A petition for rehearing was denied on September 6, 2018 (Pet. App. 58a-59a). The petition for a writ of certiorari was filed on October 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

According to petitioners, the Ninth Circuit wrongly departed from multiple circuits in holding that Section

14(e) of the Securities Exchange Act of 1934 requires proof of negligence, not scienter. And according to petitioners, this "circuit split" is "as square, obvious, and consequential as they come." Pet. 15. Petitioners are wrong across the board.

First, the Ninth Circuit's decision does not implicate any direct circuit conflict. Petitioners cannot identify a single appellate decision that squarely rejects the Ninth Circuit's logic, much less in the relevant context (construing Section 14(e)'s *first* clause, not its second) and after this Court's intervening guidance. Once the circuit decisions are reviewed in their proper context (which petitioners brush aside), the circuit conflict is illusory.

Second, the Ninth Circuit correctly read Section 14(e)'s plain language to mean what it says. Its two clauses are set up as separate, independent bans on distinct wrongdoing. The first clause—prohibiting material misstatements and omissions—has nothing to do with scienter. Indeed, a scienter requirement does not expressly appear *anywhere* in Section 14(e), and only its second clause even uses words traditionally associated with scienter ("fraudulent, deceptive, and manipulative"). This Court has *twice* construed materially identical text as requiring mere negligence, not scienter. There is no reason to give the same language a different meaning here.

Third, this case lacks any broader significance warranting review. Petitioners predict a rash of reckless securities litigation, but their concerns are unfounded. Securities claims are difficult to prove. There are few cases that can satisfy every other heightened element, but would still lose on scienter alone. This issue is unlikely to matter in any meaningful number of cases, which is likely why few appellate courts have squarely addressed the question.

Finally, petitioners suggest in passing that the Court should grant review to decide whether Section 14(e) authorizes a private right of action. That question was not pressed or passed upon below; quite the contrary, petitioners expressly *conceded* that Section 14(e) *does* support a private right of action. In any event, that question is insubstantial on the merits. Every single circuit to have confronted the question has reaffirmed that Section 14(e) is privately enforceable; this Court has implicitly done the same; and Congress has twice enacted major overhauls of the securities laws without disturbing this clear and unbroken line of authority. Congress enacted Section 14(e) against the backdrop of directly analogous implied actions *in this very context*; when Congress invoked the same textual formulation, it quite clearly intended the same result. If the Court nonetheless thinks the issue has any possible merit, it should at least await a vehicle where the petitioners did not outright waive the question below.

The Ninth Circuit faithfully read Section 14(e)'s plain text consistent with this Court's unmistakable guidance, and its decision does not directly conflict with the actual holding of any court of appeals. The petition for a writ of certiorari should be denied.

STATEMENT

1. This action arises from a merger between Emulex Corporation and Avago Technologies. The companies announced their merger agreement in February 2015, with "Avago offering to pay $8.00 for every share of outstanding Emulex stock." Pet. App. 2a-3a. That price reflected a 26.4% premium over the previous closing price, and a 4.8% premium over Emulex's 52-week high. C.A. E.R. 96-97; see also Pet. App. 39a.

Emulex hired Goldman Sachs to perform a fairness analysis on the proposed deal. As part of its work, Goldman Sachs conducted a premium analysis—a study of 17 comparable transactions that Goldman Sachs "deemed most similar to the proposed merger." Pet. App. 4a-5a. That analysis revealed Emulex's premium was decidedly below average: other companies received mean and medium premiums of (i) 44.8% and 50.8% over their undisturbed stock price, and (ii) 17.6% and 14.4% over their 52-week highs. C.A. E.R. 261. Those figures represented *multiples* of the premium offered to Emulex's shareholders. Goldman Sachs nonetheless concluded the merger was fair "despite a below-average premium." Pet. App. 5a.

Emulex filed a 48-page Recommendation Statement with the SEC supporting Avago's offer and encouraging shareholders to tender their shares. Pet. App. 3a-4a; C.A. E.R. 45. It listed nine reasons for that recommendation, including (repeatedly) that "Emulex shareholders would receive a premium on their stock." Pet. App. 4a. Despite devoting five single-spaced pages to summarizing Goldman Sachs's fairness opinion, Emulex neglected to disclose the premium analysis (or its showing of a below-average premium) at any point in its extended filing. *Id.* at 5a, 30a.

The merger was ultimately consummated, but the approval was close: only 60.58% of outstanding shares were tendered. C.A. E.R. 194.

2. In response to these events, a shareholder class filed suit against Emulex, its board, and Avago for violating federal securities laws. Pet. App. 5a-6a. As relevant here, the class sought relief under Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), which was added as part of the Williams Act of 1968, Pub. L. No. 90-439, 92 Stat. 454.

Section 14(e) sets out two distinct types of liability in the tender context. Its first clause prohibits "any untrue statement of a material fact or [a material] omi[ssion]," and its second clause prohibits "any fraudulent, deceptive, or manipulative acts or practices." 15 U.S.C. 78n(e). The class alleged a violation of the first clause: petitioners made material misstatements and omissions by touting the premium while failing to "disclose[]" it "was below average." Pet. App. 5a.

3. The district court dismissed the complaint. Pet. App. 27a-57a. It held that scienter was required to prove a Section 14(e) violation, and it found the class failed to adequately allege scienter. *Id.* at 33a-51a. In the course of its analysis, the court acknowledged respondents' position that scienter was not required, and recognized that scholars and treatises read Section 14(e)'s first clause as imposing only a negligence standard. *Id.* at 35a-36a. While the court admitted respondents' position was "not entirely without merit," it decided the "better view" was to follow "the wealth of persuasive case law to the contrary." *Id.* at 36a.[1]

4. a. The court of appeals reversed. Pet. App. 1a-26a. As relevant here, the court held that claims premised on Section 14(e)'s first clause "require[] a showing of negligence, not scienter." *Id.* at 2a. Because respondents' claims were premised solely on that first clause, the court found the district court erred by requiring a showing of intentional misconduct. *Id.* at 20a.

The Ninth Circuit started its analysis with the text. Pet. App. 8a. It noted that a "plain reading" of Section

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[1] Because the district court dismissed the complaint on culpability grounds, it declined to decide whether respondents had adequately pleaded materiality. See Pet. App. 34a n.3.

14(e) "divides the section into two clauses, each proscribing different conduct." *Ibid.* It found that the "text of the first clause" is "devoid of any suggestion that scienter is required." *Id.* at 16a. It explained that this Court had construed "largely identical" text to "require[] a showing of negligence, not scienter." *Id.* at 13a (discussing *Aaron* v. *SEC*, 446 U.S. 680 (1980), and *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976)). And the court reinforced its conclusion with Section 14(e)'s "legislative history and purpose"—which "place[] more emphasis on the quality of information shareholders receive in a tender offer than on the [issuer's] state of mind." *Id.* at 15a-16a.

While recognizing that other courts had suggested scienter is required, the Ninth Circuit exhaustively refuted their logic, especially their presumption that the same rules apply to both Rule 10b-5 (which requires scienter) and Section 14(e)'s first clause (which does not). Pet. App. 9a-16a. As the Ninth Circuit explained, those courts overlooked "important distinctions" between the two provisions, and likewise ignored (or preceded) this Court's pertinent authority. *Id.* at 9a, 14a-15a. The court explained, for example, that *Ernst*'s conclusion to require scienter under Rule 10b-5 "had nothing to do with [its] text," but instead resulted from the Rule's "relationship" with "its authorizing legislation, Section 10(b)," which textually *did* require scienter. *Id.* at 11a-12a (further noting that "[t]his rationale regarding Rule 10b-5 does not apply to Section 14(e), which is a statute, not an SEC Rule"). And it explained that other decisions preceded *Aaron*, which construed Section 17(a)(2)'s parallel language to "*not* require a showing of scienter"—thus "cast[ing] doubt" on earlier Section 14(e) decisions from multiple circuits. *Id.* at 12a.

b. Judge Christen concurred in "full[]." Pet. App. 20a. She emphasized that the panel's decision "is a faithful application" of this Court's decisions, unlike other courts

that failed to "address[] the ramifications of the Supreme Court's holdings." *Id.* at 20a-26a. Under the Act's plain text, she explained, "[o]nly the second clause of § 14(e) contemplates a scienter requirement; Congress did not use the words signaling a heightened standard of culpability in the first clause of the statute." *Id.* at 24a.

Judge Christen concluded that one "cannot be sure how other circuits would rule were they to revisit § 14(e) in light of *Ernst & Ernst* and *Aaron*." Pet. App. 26a.

5. The court of appeals subsequently denied a petition for rehearing without recorded dissent. Pet. App. 58a-59a.

ARGUMENT

A. The Decision Below Does Not Create A Square Circuit Conflict

Contrary to petitioners' contention, the Ninth Circuit did not create a genuine circuit conflict. Petitioners cannot identify a single circuit actually deciding the issue after analyzing Section 14(e)'s *first* clause, especially in a case post-dating this Court's authoritative decisions. None of the cases grapple with the Ninth Circuit's rationale. Those cases rest on scant reasoning (or worse); some address the question in dicta (and thus *held* nothing); and at least one "decided" the issue when it was *uncontested* by both sides, leaving nothing *to decide*. Aside from a few errant statements and some superficial disagreement, there is no legitimate split. Further review is unwarranted.

1. a. Petitioners argue that the Ninth Circuit's holding conflicts with an "unbroken line of decisions," starting with the Second Circuit's decision in *Chris-Craft Indus., Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973). See Pet. 12. But *Chris-Craft* was decided before this Court's intervening decisions in *Ernst* and *Aaron*, which undeniably altered the landscape. And the overriding effects of this Court's precedents are obvious. According to

Chris-Craft, because the text of Section 14(e) is "virtually identical" to the text of Rule 10b-5, the two provisions should have the same elements. 480 F.2d at 362. But *Ernst* later explained that Rule 10b-5 was narrowed due to the limiting language in Section 10(b), which does *not* limit Section 14(e). And *Aaron* construed language indistinguishable from Section 14(e)'s first clause to require negligence, not scienter. *Chris-Craft* did not break down and examine Section 14(e)'s text (see 480 F.2d at 362-363), and it assumed a direct connection between Rule 10b-5 and Section 14(e) that (under *Ernst* and *Aaron*) does not exist. The Second Circuit had no occasion to consider the relevant question in light of this Court's subsequent authority.

Moreover, petitioners overlook the Second Circuit's actual holding. While the court said that "mere negligence" was not enough, it continued to adopt a pseudo-*negligence* standard: "In sum, and put as simply as possible, the standard for determining liability under § 14(e) * * * is whether plaintiff has established that defendant either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts *when they were available to him or could have been discovered by him with reasonable effort*." 480 F.2d at 364 (emphasis added). The latter phrase closely approximates today's version of negligence, further eliminating any practical daylight between *Chris-Craft* and the decision below. In any event, the Second Circuit ultimately held that "each of the defendants violated § 14(e)," so there was culpability *under either standard*. *Id.* at 362. The question presented here was thus irrelevant to the outcome. If this is a conflict at all, it is exceptionally weak.

To overcome these problems, petitioners say the Second Circuit has "adhered" to a scienter requirement "ever since," but they cite only a single case for support. Pet. 12

(invoking *Connecticut Nat'l Bank* v. *Fluor Corp.*, 808 F.2d 957 (2d Cir. 1987)). While *Fluor* at least came after this Court's relevant decisions, it neither discussed nor analyzed *Ernst* or *Aaron*. It merely declared the issue "settled" without explanation, let alone any attempt to square *Chris-Craft*'s (discredited) rationale with this Court's authority. It is hard to understand *Flour* as reconciling *Chris-Craft* with two Supreme Court cases it failed to cite. And *Fluor*'s scant review was unsurprising: the plaintiff's claims there—focusing on type size and paragraph placement—arguably implicated Section 14(e)'s *second* clause, not its first, presenting a different legal question. 808 F.2d at 960-961. There is no live conflict with the Second Circuit.

b. Nor is there any genuine conflict with the Fifth Circuit. Contra Pet. 12-13. First, *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974), also arose before *Ernst* and *Aaron*, rendering any theoretical conflict stale. And it is especially stale given *Smallwood*'s narrow reasoning: according to the Fifth Circuit, because Congress modeled Section 14(e) after "the second paragraph of Rule 10b-5," then Congress also "accepted the precedential baggage" of those words. *Id.* at 605. Yet the "words" of Rule 10b-5 were modeled after the words of Section 17(a)(2), *which* Aaron *later construed to require negligence, not scienter*. See *Aaron*, 446 U.S. at 696-697 (construing 15 U.S.C. 77q(a)(2)'s prohibition on "untrue statement[s]" of material fact or material "omis[issions]"); *Ernst*, 425 U.S. at 213 n.32 (explaining Rule 10b-5's "deriv[ation]" from Section 17). The Fifth Circuit would have been aware of this important development had it decided the issue after *Aaron*. As it stands today, however,

the "precedential baggage" of the relevant language flips the Fifth Circuit's conclusion on its head.[2]

Petitioners again respond (Pet. 13) that the Fifth Circuit "adhered" to a scienter requirement in *Flaherty & Crumrine Preferred Income Fund, Inc.*, 565 F.3d 200 (5th Cir. 2009). But *Flaherty*'s limited discussion was dicta. It found no actionable "misstatement" because the challenged disclosures were *"accurate[]"—i.e.*, the disclosures were not "insufficient, let alone fraudulent." 565 F.3d at 210-211 (emphasis added). That predicate finding was outcome-determinative. Scienter was discussed only hypothetically—*"[e]ven assuming"* any statement was "misleading." *Id.* at 211 (emphasis added). In understandably cursory treatment, *Flaherty* declared Section 14(e)'s elements "identical to the Section 10(b)/Rule 10b-5 elements" (*id.* at 207 (citing *Smallwood*)), but never asked whether *Smallwood* survived *Ernst* or *Aaron*, which it never mentioned. The question presented thus has not been definitively resolved in the Fifth Circuit.

c. Petitioners next count *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422 (6th Cir. 1980), as part of the split. Pet. 13. This is more than a reach. *Adams* was not even a Section 14(e) case; it resolved different claims (*e.g.*, under "[Sections] 10(b) and 14(a)"), and thus *held* nothing under Section 14(e). 623 F.2d at 423-424. The Sixth Circuit discussed Section 14(e) merely as "another * * * consider-

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[2] While *Smallwood* declared "mere negligence" insufficient, it emphasized "[t]he trend" in federal courts "toward a more relaxed [scienter] test," again suggesting a standard resembling negligence. 489 F.2d at 606.

ation" for its *actual* holding under the Act's other provisions. *Id.* at 430 (looking to Congress's intent behind "subsequent amendments that are indirectly linked to 14(a)").[3]

Even *Adams*'s sparse analysis fails to help petitioners. The Sixth Circuit suggested that "scienter" was required under Section 14(e) because it "use[s] the words 'fraudulent,' 'deceptive,' and 'manipulative.'" 623 F.2d at 431. But those words appear exclusively in Section 14(e)'s *second* clause, which is irrelevant here. *Adams* ignored the first clause's distinct language, and never considered that each clause could have different elements, including distinct "culpability requirement[s]." *Aaron*, 446 U.S. at 697. And since *Adams* was issued *before Aaron* by a month, it did not grapple with *Aaron*'s discussion of Section 17(a)(2), which mirrors Section 14(e)'s *relevant* language. See *id.* at 695-697. In short, if *Adams* believed that scienter applies whenever Congress "uses" language like Section 14(e)'s *second* clause (per *Ernst*), it presumably would also find negligence applies whenever Congress "uses" language like Section 14(e)'s *first* clause (per *Aaron*). That question, again, remains open in the Sixth Circuit.[4]

d. Petitioners' reliance on *In re Digital Island Sec. Litig.*, 357 F.3d 322 (3d Cir. 2004), is likewise flawed. See Pet. 13-14. The issue there was *conceded*: "both parties"

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[3] *Adams*'s holding under those other provisions was not even unanimous. 623 F.2d at 447 (Weick, J., dissenting on denial of reh'g) ("unlike Section 10(b)," "neither Section 14(a) nor Rule 14a-9 uses language which would even suggest a [scienter] requirement").

[4] Indeed, it is far from obvious that the Sixth Circuit even intended its commentary to apply to Section 14(e)'s first clause: it grounded its views directly in the presumption that "Congress intends scienter when it uses the above quoted language"—*i.e.*, "the words 'fraudulent,' 'deceptive,' and 'manipulative.'" 623 F.2d at 431. The Sixth Circuit did not say what standard is appropriate when Congress uses the *different* "language" in Section 14(e)'s first clause (*i.e.*, the making of "any untrue statement of a material fact" or material "omi[ssion]").

"agree[d]" that "Section 14(e) requires proof of scienter" (357 F.3d at 328 & n.9), so there was nothing for the court to decide. It is hardly obvious that *Digital*'s single paragraph on an undisputed issue stands as binding precedent in the Third Circuit.

In any event, likely because the issue was uncontested, *Digital*'s commentary was brief. 357 F.3d at 328. It said that because Section 14(e) was "'modeled'" on Section 10(b) and Rule 10b-5, it must likewise require "proof of scienter." *Ibid.* But the court drew that rough comparison without analyzing Section 14(e)'s actual text, acknowledging its two independent clauses, explaining why those distinct clauses have the same elements, or reconciling its views with *Aaron* (which the Third Circuit never cited or discussed). Moreover, the complaint was dismissed on alternative grounds, and the Third Circuit declared the plaintiffs' theory "a weak inference teetering on an unfounded assumption." *Id.* at 327, 330. It is a stretch to label *Digital*—a thin analysis of an uncontested issue in a poor vehicle—as a genuine conflict.

e. As their final shot, petitioners argue that *SEC* v. *Ginsburg*, 362 F.3d 1292 (11th Cir. 2004), also rejected the Ninth Circuit's position. Pet. 14. But *Ginsburg* did not even present the same issue: it confronted *insider-trading* allegations, which fall under Section 14(e)'s *second* clause, not its first. See 362 F.3d at 1295. *Ginsburg* treated claims identically under "§ 10(b) and § 14(e)" despite their obvious textual differences, and found that both require "scienter" without explanation. *Id.* at 1297. Indeed, *Ginsburg*'s sole "support" consisted of a bald citation to *SEC* v. *Adler*, 137 F.3d 1325 (11th Cir. 1998), which addressed claims "under § 10(b), Rule 10b-5, and § 17(a)(1)," *not* Section 14(e). 137 F.3d at 1340.

And it goes downhill from there: *Adler* tellingly limited its "scienter" discussion to Section "17(a)(1)," not Section 17(a)(2). See 137 F.3d at 1340. The former approximates claims under Section 14(e)'s *second* clause, requiring scienter; the latter approximates claims under Section 14(e)'s *first* clause, requiring negligence. *Aaron*, 446 U.S. at 695-697. If anything, this indicates that the Eleventh Circuit, like the Ninth Circuit, would have drawn the correct line were this question factually presented.

In any event, *Ginsburg*'s (sparse) discussion was irrelevant to the outcome because scienter was *satisfied*. See 362 F.3d at 1296. *Ginsburg* thus addressed the wrong clause, was unreasoned, and would have reached the same result under a negligence standard. That is thin gruel for a circuit conflict.[5]

2. Petitioners' claim of a "square, obvious, and consequential" circuit conflict (Pet. 15) is thus deeply overblown. But to the extent some disagreement exists, this is a clear-cut case for further percolation. No other court of appeals has grappled with the Ninth Circuit's analysis. As explained above, other circuits have overlooked Section

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[5] Unlike petitioners, the U.S. Chamber of Commerce argues that Eighth Circuit law is also "in conflict" with the decision below. U.S. Chamber Amicus Br. 4 (citing *Feldbaum* v. *Avon Prods., Inc.*, 741 F.2d 234, 237 (8th Cir. 1984)). There is a reason that not even petitioners included this case among the purported split. *Feldbaum* had nothing to do with culpability requirements. The word "scienter" does not appear anywhere in the opinion, and the court's limited discussion focused on whether there was *a material misstatement* or *manipulative device*. See 741 F.2d at 236-237 ("we hold the District Court was correct in its dismissal of plaintiff's claim that defendants failed to disclose material facts"; "[w]e also agree with the District Court's conclusion that the option granted to AVP is not a manipulative device"). While most of petitioners' authority focused on the wrong clause in Section 14(e), the Chamber's case does not even focus on the right question.

14(e)'s operative text, flouted *Aaron*'s construction of indistinguishable language, and embraced *Ernst*'s holding while ignoring its controlling rationale—which expressly cabins *Ernst* to Section 10(b)'s unique context. If petitioners are truly right that all of these factors are irrelevant, then the Court can take up the issue after at least *one* court of appeals confirms its prior position. But review at this point is decidedly premature.

The Ninth Circuit's analysis is the most robust of any case resolving this issue, counterbalancing the simple head-counting on the other side. Given that no other circuit has squarely addressed this question in an appropriate case, there is every reason to offer them a chance to sharpen the issues and reach the correct disposition. As of now, however, petitioners have failed to identify a genuine conflict warranting the Court's immediate intervention.

B. The Decision Below Is Correct

Review is also unwarranted because the Ninth Circuit's decision is correct. Petitioners' contrary view (Pet. 15-22) is incompatible with Section 14(e)'s plain text, statutory purpose, and legislative history, and their reading is irreconcilable with this Court's interpretation of indistinguishable language in related securities provisions. Petitioners' argument is meritless and should be rejected.

1. a. Statutory interpretation starts with the text (*e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017)), and the text here is unambiguous. Section 14(e) is plainly divided into two clauses, each targeting a different category of prohibited conduct:

> It shall be unlawful for any person [1] to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or [2] to engage

> in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer * * * .

15 U.S.C. 77n(e) (brackets added).

The first clause has no hint of scienter. It does not expressly require scienter (or *any* specific state of mind). It does not use any of the usual terms associated with scienter (*Aaron*, 446 U.S. at 695-696), even though the *second* clause does (*Ernst*, 425 U.S. at 199). Its terms are satisfied whenever a covered defendant makes a material misstatement or omission, irrespective of the actor's intent. And it does so in the context of a statute mandating *disclosure* so shareholders can make informed decisions. *Schreiber* v. *Burlington N., Inc.*, 472 U.S. 1, 8-10 (1985). A *negligent* misstatement or omission is still a misstatement or omission, and it still deprives shareholders of necessary information. If Congress wanted to restrict Section 14(e)'s reach to intentional wrongdoing, it assuredly knew how to do it.

b. This Court has already twice construed indistinguishable language as requiring negligence, not scienter. First, the Court in *Aaron* so held for Section 17(a)(2), which prohibits "obtain[ing] money or property by means of any untrue statement of a material fact or any [material] omission." 15 U.S.C. 77q(a)(2); compare 15 U.S.C. 78n(e) (using indistinguishable terms). As *Aaron* explained, that language is "devoid of any suggestion whatsoever of a scienter requirement." 446 U.S. at 696. It quoted a "well-known commentator" as noting "'[t]here is nothing on the face of [Section 17(a)(2)] itself which smacks of *scienter* or intent to defraud." *Ibid.* (quoting 3 L. Loss, *Securities Regulation* 1442 (2d ed. 1961)).[6] While

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[6] That same "well-known commentator" examined Section 14(e)'s text and concluded its first clause likewise requires negligence, not

other parts of Section 17(a) might require scienter, this Court found that Section 17(a)(2)'s language "compel[s] the conclusion" that "scienter" is not "required." *Id.* at 697.

Petitioners have no real answer for the obvious parallel between Sections 14(e) and 17(a)(2). *Aaron* read materially indistinguishable language to "mean what it so plainly seems to say"—that scienter was *not* required. 446 U.S. at 697. There is simply no basis for assigning the same words a different meaning here.[7]

Second, this Court in *Ernst* read the same language the same way, finding that Rule 10b-5(b)'s parallel text "could encompass both intentional and negligent behavior." 425 U.S. at 212-213 (Rule 10b-5(b)'s language, "[v]iewed in isolation," proscribes "any type of material misstatement or omission," "whether the wrongdoing was intentional or not"); accord *Aaron*, 446 U.S. at 696 (reaffirming this point). While *Ernst* ultimately adopted a different reading, it did so for *independent* reasons, none of

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scienter. L. Loss, et al., *Fundamentals of Securities Regulation* 652 (5th ed. 2004) (reproduced at C.A. E.R. 190).

[7] Petitioners argue *Aaron* is distinguishable because (i) Section 17(a) is not privately enforceable, and (ii) *Aaron* involved claims for injunctive relief. Pet. 21-22. As for the first: the relevant question is not *who* enforces these sections, but *what these sections mean*; the "identity of the plaintiff" is irrelevant. *Aaron*, 446 U.S. at 691 (so holding). As for the second: the right inquiry is not what relief is available once culpability is established, but *the standard for establishing culpability*. *Ibid.* (rejecting the proposition that the standard turns on "the identity of the plaintiff or *the nature of the relief sought*") (emphasis added). *Aaron* examined the plain text and determined intent was not required to prove a violation. The language in each section (Sections 14(e) and 17(a)(2)) is indistinguishable, and *Aaron* construed that language on its face to require only negligence, not scienter.

which apply here. See *Ernst*, 425 U.S. at 212-213 (explaining that, under its natural reading, Rule 10b-5 would "exceed" the SEC's rulemaking authority, given Section 10(b)'s narrow focus on "intentional wrongdoing").

In response, petitioners argue that, whatever its reasoning, *Ernst* still "held" that scienter was required, and Section 14(e) tracks Section 10(b) and Rule 10b-5. Pet. 15-16. This is perplexing. *Ernst*'s disposition turned on the limited scope of Section 10(b), not the broader language in Rule 10b-5. See *Aaron*, 446 U.S. at 690 (so noting). As *Ernst* explained, Section 10(b), unlike Section 14(e), focused *exclusively* on concepts invoking scienter ("manipulation," "deception," etc.). 425 U.S. at 197-199. Because Section 10(b) required scienter, Rule 10b-5 also had to require scienter; otherwise, the SEC's rule would "exceed" the scope of its rulemaking authority. *Id.* at 212-213.[8]

Those points have nothing to do with Section 14(e). Its two clauses are each found in a *statute*, not a regulation. There is no concern of the SEC exceeding its authority, because the question is what *Congress* itself wrote into the statute. And while Section 14(e)'s second clause mirrors Section 10(b)'s language, its first clause has no counterpart in Section 10(b). That first clause sweeps beyond Section 10(b)'s narrow focus, and its terms are "devoid of any suggestion whatsoever of a scienter requirement." *Aaron*, 446 U.S. at 696. For exactly those reasons, this Court

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[8] Contrary to petitioners' contention, *Ernst*'s "central teaching" thus was not its brief reference to "'procedural restrictions'" (Pet. 21); the Court was clear that Section 10(b)'s language drove the analysis. *Ernst*, 425 U.S. at 200-201 (focusing "primarily on the language of that section"); see also *Aaron*, 446 U.S. at 690 (*Ernst*'s "most important" consideration "was the plain meaning of the language of § 10(b)"). Petitioners are wrong to minimize the Court's paramount focus on the language itself.

readily concluded that Section 17(a)(2) required negligence, not scienter, despite its parallels to Section 10(b) and Rule 10b-5. The same logic inescapably applies here. See also, *e.g.*, *Pryor* v. *U.S. Steel Corp.*, 591 F. Supp. 942, 955 n.19 (S.D.N.Y. 1984).

Petitioners retort that Congress modeled Section 14(e)'s language on the text of Rule 10b-5, so the two must have the same meaning. Pet. 16, 21. But this ignores that Rule 10b-5(b) itself was based on the text of Section 17(a)(2) (see *Ernst*, 425 U.S. at 213 n.32), which, again, this Court *construed to require negligence, not scienter* (see *Aaron*, 446 U.S. at 695-697). Had the Rule not been constrained by the *narrower* text of Section 10(b), the Court presumably would have adopted Rule 10b-5's natural reading, consistent with its origins in Section 17. To the extent the historical source dictates the text's meaning, this only reaffirms the Ninth Circuit's construction.[9]

2. Petitioners' efforts to avoid the plain text fall short.

a. Petitioners insist that Section 14(e)'s separate clauses must be read together to impose a unitary scienter requirement. Pet. 17-18. But this Court already rejected that proposition in *Aaron*, holding that no "uniform" treatment was required. 446 U.S. at 697. It explained that provisions like this are properly read as targeting separate categories, each with their own independent requirements. *Ibid.* ("each subparagraph of § 17(a) 'proscribes a distinct category of misconduct'"). This is confirmed by "the use of an infinitive to introduce each of [the] subsections, and the use of the conjunction 'or' at the end of the

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[9] Petitioners thus miss the irony in arguing that "the Ninth Circuit overlooked that, unlike Section 14(e), Section 17 of the 1933 Act was not 'modeled on the antifraud provisions of § 10(b) of the [1933] Act and Rule 10b-5.'" Pet. 21. On the contrary, Rule 10b-5 *was modeled after Section 17*. *Ernst*, 425 U.S. at 213 n.32. Petitioners thus have the history exactly backwards.

first two." *United States* v. *Naftalin*, 441 U.S. 768, 774 (1979). Had Congress wanted identical coverage under each clause, it would have used the same wording in each section. *Id.* at 773-774. Instead, Congress outlined "distinct categor[ies] of misconduct" because "[e]ach succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." *Id.* at 774; accord *Aaron*, 446 U.S. at 697.[10]

That reasoning controls here. As with Section 17(a), Section 14(e)'s clauses are phrased in the disjunctive, and each clause is "introduce[d]" with "an infinitive." *Naftalin*, 441 U.S. at 774. Congress enumerated two prohibitions to establish liability if one "*or*" the other is met; it did not separate out independent commands (each with its own infinitive) only to collapse the two together. See, *e.g.*, *McFarland* v. *Wells Fargo Bank, N.A.*, 810 F.3d 273, 285 (4th Cir. 2016); *United States* v. *Sheldon*, 755 F.3d 1047, 1050 (9th Cir. 2014); *Stevens* v. *Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 452 (6th Cir. 1992).

Moreover, petitioners' reading invites an obvious surplusage problem: if each clause requires scienter, then these two separate provisions, drafted in conspicuously different terms, would cover the same conduct. An *intentional* "untrue statement" surely qualifies as a "fraudulent, deceptive, or manipulative act[] or practice[]" (15 U.S.C. 78n(e)), leaving nothing for Section 14(e)'s first

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[10] Although Section 17(a) is broken into formal subsections, the Court looked primarily at "the words themselves," not "the use of separate numbers to introduce each subsection." *Naftalin*, 441 U.S. at 774 n.5. The section's "'punctuation'" was addressed only in a single footnote as mere "confirmation" for the language appearing "'on the face of the statute.'" *Ibid.* At bottom, the operative language in each provision is still found in a *single sentence*.

clause to do. These clauses use different language to invoke different prohibitions, and the Ninth Circuit's construction gives independent meaning to "'each distinct category of misconduct.'" *Aaron*, 446 U.S. at 697. Petitioners' theory, by contrast, reads the first clause straight out of the statute. See *Lane* v. *United States*, 286 F.3d 723, 730-731 (4th Cir. 2002).

b. Nor does noscitur a sociis require a different outcome. Pet. 17. That canon cannot override each clause's unambiguous language, and petitioners cannot explain why the second clause (with its distinct prohibition) should artificially limit the first clause's natural scope. *In re Continental Airlines, Inc.*, 932 F.2d 282, 288 (3d Cir. 1991). Petitioners might have a point if Congress had prohibited [1] "mak[ing] any untrue statement" or [2] "engag[ing] in any *other* fraudulent, deceptive, or manipulative" act. But "Congress did not write the statute that way." *Naftalin*, 441 U.S. at 773. Congress isolated the terms invoking scienter to a distinct clause, and clearly delineated the section's *two* prohibitions by phrasing them in the disjunctive, introducing each with the infinitive "to." "When Congress has separated terms with the conjunction 'or,' it is presumed that Congress intended to give the terms 'their separate, normal meanings.'" *Ibid.* (quoting *Garcia* v. *United States*, 469 U.S. 70, 73 (1984)).[11]

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[11] A better use of noscitur a sociis here is construing the three words in the *second* clause by "the company [they] keep[]" (*Yates* v. *United States*, 135 S. Ct. 1074, 1085 (2015))—which is why it makes sense to require scienter for "manipulative" or "deceptive" acts. But it makes no more sense to impose a scienter requirement for the first clause than it would to *eliminate* one for the second—even though the first clause is naturally read to capture only *negligence* and in fact *precedes* the second part of the sentence.

In sum, just as there was no reason in *Aaron* to distort Section 17(a)(2)'s natural meaning due to its "neighbor[ing]" clauses (Pet. 17), there is no reason to distort Section 14(e)'s first clause here. Petitioners have no legal or logical basis for reading this distinct language to impose a uniform culpability requirement. See, *e.g.*, *Aaron*, 446 U.S. at 697 (rejecting an analogous proposition).

c. Petitioners also focus on Section 14(e)'s limited rulemaking delegation (Pet. 18), but this proves *respondents'* point. That delegation authorizes the SEC to regulate actions falling within Section 14(e)'s *second* clause, but not its first. 15 U.S.C. 78n(e) (limiting the SEC's focus to "acts and practices" that "are fraudulent, deceptive, or manipulative"). If Congress felt both clauses covered the same ground, it would have authorized rulemaking under the entire subsection. The limited delegation reaffirms that Congress saw an obvious difference between the two provisions, each warranting its own separate treatment.

Petitioners ask why Congress would authorize the SEC to combat only "[]fraud" if Section 14(e)'s first clause covers negligence. The answer is obvious: The second clause requires more guidance. The first clause covers misstatements and omissions, which are known quantities with established meanings. They require little elaboration.[12] That is not true of the second category, which covers *any* unspecified "act[]" or "practice[]" that is "fraudulent, deceptive, or manipulative." That undefined conduct begs for rules clarifying stakeholders' rights and obligations. Congress's targeted delegation says nothing about the standards to prove a violation under the first clause.

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[12] Anyhow, the SEC had *preexisting* authority under Section 14(d) to regulate mandatory disclosures for tender offers, including any misstatements or omissions. 15 U.S.C. 78n(d)(4).

d. Petitioners argue that the outcome in *Ernst* turned not on the text, but Section 10(b)'s absence of "'significant procedural restrictions'"—and Congress would not authorize an action for "mere negligence" without imposing the same safeguards found in its "express causes of action[]." Pet. 16, 21 (citing *Ernst*, 425 U.S. at 208-209). Petitioners have misread *Ernst*: the Court's concern was not the absence of procedural restrictions per se, but the reality that extending the "remedy under § 10(b)" would "nullify" the *express* actions under other sections (by covering the same ground). *Ernst*, 425 U.S. at 209 (discussing Section 10(b)'s substantive overlap with "causes of action covered by §§ 11, 12(2), and 15"). There is no such concern with Section 14(e)'s targeted prohibitions in the tender context.[13]

In short, contrary to petitioners' contention, the Court's single paragraph on this point does not stand for the sweeping proposition that negligence standards are always verboten in implied rights of action.

3. Petitioners' theory would also undermine Congress's objectives. Section 14(e) was "devoted to disclosure." *Schreiber*, 472 U.S. at 11-12. It affirmed the offeror's obligation "to make full disclosure of material information" (H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968)), arming shareholders with the facts necessary to make intelligent decisions. *United States* v. *O'Hagan*, 521 U.S. 642, 667-668 (1997); *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 30-31 (1977).

That purpose is frustrated when corporate actors fail to furnish material information, intentionally or otherwise. A negligence standard "serve[s] to reinforce the high duty of care owed by a controlling corporation" to its

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[13] Besides, the culpability standard is a *substantive* element; scienter is not a "procedural" restriction. Contra Pet. 18.

shareholders (*Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1300 (2d Cir. 1973)), especially when making critical decisions. Congress expected corporate statements to be correct—which is why it declared it "unlawful" to "make *any* untrue statement" or "omi[ssion]." 15 U.S.C. 78n(e) (emphasis added). Requiring scienter undercuts Congress's disclosure mandate.

Section 14(e)'s context also differs from other areas where scienter makes sense. Rule 10b-5 cases, for example, often target speakers under no "obligation" to say anything. *Gerstle*, 478 F.2d at 1300. An innocent mistake on a non-mandatory topic requires heightened protection, which preserves the incentive for speakers to voluntarily disclose information. *Ibid.*; see also, *e.g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 866-867 (2d Cir. 1968) (Friendly, J., concurring) ("If the only choices open to a corporation are either to remain silent and let false rumors do their work, or to make a communication, *not legally required*, at the risk that a slip of the pen or failure properly to amass or weigh the facts * * * will lead to large judgments," "most corporations would opt for the former") (emphasis added).

Those concerns have little place in the context of compulsory disclosures. Sections 14(a) and 14(e) govern compulsory statements required by law before corporate mergers can be submitted for shareholder approval. In that different context, speakers are required to provide necessary information so shareholders can make informed decisions. While the decision to voluntarily speak on other topics is sensibly left to a higher bar, Section 14(e)'s plain

text reflects Congress's intent to subject these disclosures to more stringent review.[14]

Finally, a scienter requirement is incompatible with Section 14's broader scheme. Congress enacted Section 14(e) to impose the same rules in the tender context that Section 14(a) already imposed in the proxy context. See, *e.g.*, *Adams*, 623 F.2d at 430 (Congress intended uniform "standards of liability" for Sections 14(a) and 14(e)). And courts have overwhelmingly recognized that negligence is sufficient to state a claim under Section 14(a). *DeKalb Cty. Pension Fund* v. *Transocean Ltd.*, 817 F.3d 393, 409 & n.95 (2d Cir. 2016). There is no obvious reason for adopting a different liability standard under Section 14(e).

C. The Petition Does Not Present An Important Question Warranting Further Review In This Case

All else aside, the question presented lacks sufficient importance to warrant further review. A negligence standard is unlikely to determine the outcome in all but a tiny percentage of securities cases, and Congress's aims

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[14] Petitioners repeatedly invoke Judge Friendly's observation of the "frightening" consequences of adopting a negligence standard under Section 10(b) and Rule 10b-5, and suggest the same concerns arise in these "analogous circumstances." See Pet. 4, 19 (quoting *Texas Gulf*, 401 F.2d at 866-867 (Friendly, J., concurring)). This point has already been refuted by—Judge Friendly himself: While "[i]mposition of too liberal a standard with respect to culpability" would deter "statements issued by corporations[] without legal obligation to do so," "*[s]uch considerations do not apply*" to "proxy statement[s] *required by the Proxy Rules*." On the contrary, "a broad standard of culpability here will serve to reinforce the high duty of care owed by a controlling corporation to minority shareholders in the preparation of a proxy statement seeking their acquiescence in this sort of transaction * * *." *Gerstle*, 478 F.2d at 1300 (Friendly, J.) (emphasis added) (drawing an explicit contrast to Rule 10b-5 and *Texas Gulf*).

are not frustrated by ensuring that mandatory disclosures are in fact *disclosed*. Moreover, courts have been enforcing private actions under Section 14(e) for decades, and Congress, if anything, has endorsed the practice as a useful regulatory tool.

A negligence standard properly holds corporate actors responsible for failing to deliver the facts essential for informed shareholder decision-making. Petitioners may nevertheless insist the sky is about to fall, but their contrary arguments are wrong, waived, or both. This Court's intervention is unwarranted.

1. Petitioners assert that the Ninth Circuit's decision will spark "abus[ive]" securities litigation. Pet. 22-24. This grave prediction is overblown. The elements of securities claims (especially materiality) are notoriously difficult to prove. Plaintiffs must cross multiple thresholds to survive a motion to dismiss, including the PSLRA's other heightened-pleading requirements. 15 U.S.C. 78u-4(b)(1)(A)-(B). That Section 14(e)'s first clause does not require scienter does not mean weak claims get a free pass.[15]

For similar reasons, petitioners are simply wrong that the decision below will act as a "magnet" drawing all securities cases to the Ninth Circuit. Pet. 3, 23. Venue decisions are motivated by a multitude of considerations. It is the rare case where a plaintiff feels he can satisfy everything *except* scienter and sues in an unnatural location for that reason alone. And if petitioners' worry is well-

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[15] Petitioners argue the Ninth Circuit's decision is at odds with the PSLRA's objectives. Pet. 24-25. But Congress could have required scienter across the board; it instead recognized that not every securities claim warrants scienter, and required a "strong inference" only for those that do. 15 U.S.C. 78u-4(b)(2)(A). Petitioners cannot substitute Congress's scalpel with a sledgehammer.

founded, this Court will have plenty of future opportunities to revisit the question. But there is no reason to grant review based on a hypothetical spike that does not actually exist.[16]

Petitioners hint that the Ninth Circuit's law is to blame for the percentage of securities cases filed in that circuit. Pet. 23 ("In 2017, for example, plaintiffs' lawyers filed more than one-fifth of all merger-related class actions in the Ninth Circuit."). What petitioners ignore is that (due to its size) approximately the same percentage of *all* cases are filed in that circuit. See, *e.g.*, U.S. Courts, *Federal Judicial Caseload Statistics 2018*, tbl. C-1 <https://tinyurl.com/2017-dct-stats> (49,669 of 292,076 civil actions). The Ninth Circuit covers nine of the fifty States (approximately 20%), and hears its fair share of cases across all subjects. It is geography, not lenient standards, that drives its docket.

Moreover, this is an odd vehicle for petitioners to complain about forum-shopping: respondents filed suit in California against *a California business* engaged in misconduct *in California*. See, *e.g.*, C.A. E.R. 74 (Schedule 14D-9 statement submitted by Emulex's CEO from "Costa Mesa, California"). Petitioners are thus correct that venue here was not by "happenstance." Pet. 23. It was the most natural and obvious location for the suit.

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[16] Petitioners argue that the "vast majority" of securities suits are dismissed, and predict that will change if suits can survive based on "a plausible allegation of negligence." Pet. 25 (citing statistics). Yet petitioners' statistics are meaningless unless *such suits were dismissed based on failure to allege scienter*. In lodging their broad claims, petitioners make no effort to parse out suits dismissed based on settlements or other relief; and they make no effort to separate suits that fail on the merits due to other deficiencies. The change in standard from scienter to negligence will not affect the outcome in any such litigation, and petitioners are wrong to baldly presume otherwise.

2. Petitioners also ignore the profound benefits produced by legitimate shareholder lawsuits. Congress demanded that companies disclose material facts in the tender context. Yet the desire to consummate a merger can encourage selective disclosure, and there are documented incentives for investment banks to whitewash fairness opinions. L. Bebchuk, et al., *Fairness Opinions: How Fair Are They and What Can Be Done About It?*, 1989 Duke L.J. 27, 30 (Feb. 1989). The SEC lacks the resources to monitor each recommendation statement in real-time. *E.g.*, *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964). Section 14(e), by design, keeps the process honest. See, *e.g.*, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (recognizing the role of "meritorious private actions" in enforcing securities laws and supplementing USDOJ and SEC efforts).

This very case illustrates the point. Here, Emulex refused to provide relevant information (Goldman Sachs's premium analysis) on a marginal tender offer. The proposal was an obvious close call, with barely 60% of outstanding shares ultimately tendered. C.A. E.R. 194. Reasonable investors would surely be interested to know that Goldman Sachs identified comparable transactions and found that this offer fell in the bottom end. C.A. E.R. 96-97, 261 (44.8% (mean) and 50.8% (median) versus 26.4% (Emulex)); see *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 30-31 (2011).

While this does not automatically establish the transaction was unfair, Section 14's entire point is letting the market decide fairness for itself. *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448 (1976). Petitioners deprived shareholders of key information that Goldman Sachs found sufficiently important to include in its own analysis. (Goldman Sachs does not often waste a board's time with irrelevant material.) That information cut

against the offer's fairness, and shareholders were entitled to the information under Section 14(e). It is unclear why a scienter standard should excuse petitioners' mistake.[17]

3. Petitioners obliquely suggest the Court should grant review on a question the Ninth Circuit did *not* decide: whether Section 14(e) provides a "private right of action at all." Pet. 3, 20. This is meritless. First and foremost, that splitless question was not resolved below because it was not *raised* below. On the contrary, petitioners expressly conceded the point: "defendants do not dispute that *Section 14(e)* provides for a private right of action." Emulex C.A. Br. 47; see also Avago C.A. Br. 4 ("join[ing] and incorporat[ing] by reference" Emulex's brief). Petitioners accordingly did not even attempt to preserve the issue below (not even in a footnote), but explicitly conceded the question. Petitioners are bound by that waiver, and it is too late now to revisit their tactical decision.

In any event, petitioners' argument on this score is insubstantial. According to petitioners and the U.S. Chamber, "Section 14(e) contains no private right, not even a hint of one." U.S. Chamber Br. 3; Pet. 20. Yet Section 14(e) contains exactly the same "hints" that have supported private rights under related securities laws for

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[17] SIFMA's amicus brief is effectively a broadside against private securities litigation generally. See, *e.g.*, SIFMA Br. 7-13. Some organizations may not like the securities laws, but the question here is how best to read the text, purpose, and history of Section 14(e) to determine its proper elements; the answer is not to abandon all traditional tools of statutory interpretation to adopt whatever construction happens to minimize securities claims. And if SIFMA believes the securities laws are too prone to abuse, its proper audience is Congress, not the courts. The political branches have proven perfectly capable of adopting new rules to police abusive securities practices. If policymakers believe the tender context is ripe for new regulation, Congress is well-equipped to solve the problem.

decades. *E.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975) (Section 10(b) and Rule 10b-5); *Borak*, 377 U.S. at 430-431 (Section 14(a)). And Congress has repeatedly revamped core features of securities litigation without once suggesting that these private rights should not exist. See, *e.g.*, Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227; Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737. Since its enactment, courts have repeatedly confirmed that "a private right of action may be inferred from Section 14(e)." *Smallwood*, 489 F.3d at 596 n.20 ("follow[ing] the overwhelming weight of authority" and "reaffirm[ing] the importance of private litigation to the effective enforcement of the securities laws"). This is likely why petitioners admitted below that "Section 14(e) provides for a private right of action." Emulex C.A. Br. 47 (emphasis omitted).[18]

The Supreme Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). If the Court wants to rethink half a century of settled practice, it should at least wait for a vehicle where the question presented was not expressly abandoned below. See, *e.g.*, *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (refusing to consider "questions neither raised nor resolved below"); *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992) ("[p]rudence" dictates "awaiting * * * the benefit of * * * lower court opinions squarely addressing the question"); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (absent

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[18] Congress's inaction is all the more telling in light of this Court's implicit recognition that Section 14(e) provides a private right of action. See, *e.g.*, *Schreiber*, 472 U.S. at 2 (reviewing and deciding the elements of *Section 14(e)'s private right of action*).

"exceptional" circumstances, this Court does not grant review on "questions not pressed or passed upon below").[19]

4. Finally, this case arises in an interlocutory posture, a sufficient reason alone for denying the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (the lack of a final judgment "alone furnishe[s] sufficient ground" for denying certiorari); see also, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari) ("[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction").

"[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree" (*Hamilton-Brown Shoe*, 240 U.S. at 258), and there is nothing at all "extraordinary" here. This case reaches the Court from a motion to dismiss. The Ninth Circuit decided a single issue related to one challenge to a single element of respondents' claims, and remanded for the district court to reconsider the remainder of petitioners' motion. If petitioners later wish to present the same question, they can do so again, if necessary, upon final judgment. That slight inconvenience for the individual parties in this single case does not warrant abandoning the Court's traditional and sound practice of refusing to hear interlocutory appeals in all but the most unusual and compelling circumstances. See, *e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 282-285 (10th ed. 2013).

And adhering to that practice is particularly sound here, where additional proceedings will allow additional time for the issue to percolate among the lower courts. If

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[19] Indeed, if petitioners and their amici genuinely believe this is an important question, it is all the more reason to deny review entirely. There is no reason for the Court to consume its limited bandwidth deciding the proper elements of a right of action that petitioners (wrongly) believe does not exist.

respondents ultimately prevail on the merits and other circuits reject the Ninth Circuit's position after squarely addressing the question in a meaningful way, review in this Court might then be appropriate. But it is plainly premature at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 18-459

In the Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Ninth Circuit's decision in this case tells the Court everything it really needs to know about why certiorari is warranted. The Ninth Circuit identified "decisions from five other circuits holding that Section 14(e) claims require alleging scienter." App. 9a. But it concluded that those decisions were incorrect, *id.*, and so adopted a new negligence standard for Section 14(e) that it acknowledged "parts ways from our colleagues in five other circuits," *id.* at 20a. Whether the Ninth Circuit was right or wrong to split off (a decision for the merits), this is precisely the kind of conflict that this Court sits to resolve.

Respondents try to paper over what the Ninth Circuit itself admitted, remarkably insisting (at 7) that there is no "genuine circuit conflict" here. But their attempt to distinguish away a half-century of case law that had uniformly required plaintiffs to plead and prove *scienter* in order to state an inferred cause of action under Section 14(e) is really just an extended argument on the merits. Respondents can reprise their arguments if this Court grants certiorari. For now, it suffices that the Ninth Circuit consciously and expressly rejected the position of every prior court of appeals to have considered the Question Presented. This Court's intervention is needed to establish a uniform, national rule.

This is an ideal case in which to do so. The Question Presented is squarely joined. The Ninth Circuit has stayed the mandate to allow this Court to resolve this threshold issue. And while Respondents float (at 13) the idea of "further percolation," in reality this issue has been "well settled" in other circuits for decades, *Connecticut Nat'l Bank v. Fluor Corp.*, 808

F.2d 957, 961 (2d Cir. 1987). Especially since the Ninth Circuit denied rehearing en banc here, the split is not going to disappear on its own. And there is no reason to subject companies, investors, and markets to the uncertainty created by the decision below.

As the amicus briefs by the U.S. Chamber of Commerce and the Securities Industry and Financial Markets Association (SIFMA) underscore, the split concerns an issue of immense practical importance. Respondents' suggestion (at 2) that the scienter "issue is unlikely to matter in any meaningful number of cases" is simply not credible. Indeed, the scienter element is so important in the securities law context that Congress added a special, heightened pleading standard for it. *See* Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4(b)(2)(A). The decision below makes that vital statutory protection irrelevant for an entire class of securities law claims.

The petition should be granted.

1. Respondents' lead argument (at 7) is that "the Ninth Circuit did not create a genuine circuit conflict." That assertion cannot be taken seriously.

a. The Ninth Circuit itself acknowledged that "our holding today parts ways from our colleagues in five other circuits." App. 20a. Other courts have already recognized the conflict. Pet. 11. And so have commentators. *See, e.g.*, 3 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 11:56 (Nov. 2018 update) (recognizing that the decision below conflicts with "a number of earlier decisions in other circuits" holding that "scienter is required for a violation of section 14(e)," and noting that "[t]his split among the circuits creates the potential of clarification from the Supreme Court"); 26A Michael

J. Kaufman, *Securities Litigation: Damages* § 16:3 (Nov. 2018 update) ("Nearly every federal court has held that plaintiffs must make a showing of scienter," except "[t]he Ninth Circuit has held that Section 14(e) requires a showing of negligence only, not scienter"); 14 *Fletcher Cyclopedia of the Law of Corporations* § 6863 (Sept. 2018 update) (recognizing conflict based on this case). Conflicts do not get more real.

b. Respondents seem to believe (at 14) there is no conflict because, in their view, the Ninth Circuit's decision is the "most robust" on this issue—and *should* be the law in other circuits as well. Their brief offers a prolonged attack on the decisions of the circuits on "the other side." BIO 14. But this goes to the merits. It does not change the fact that the Ninth Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

Respondents do not dispute, for example, that the Fifth Circuit held in *Smallwood v. Pearl Brewing Co.* that "some culpability, beyond mere negligence, is required" to state a claim for damages under Section 14(e). 489 F.2d 579, 606 (5th Cir. 1974). They simply contend (at 9) that *Smallwood*'s holding does not count, because it "arose before [*Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), and *Aaron v. SEC*, 446 U.S. 680 (1980)]." But *Ernst & Ernst* and *Aaron* involved different statutory provisions (*see* Pet. 14-15). And, in any event, in *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, the Fifth Circuit reiterated—long after *Ernst & Ernst* and *Aaron*—that Section 14(e) requires a showing that the statement or omission was "made with scienter." 565 F.3d 200, 207 (5th Cir.), *cert. denied*, 558 U.S. 873 (2009).

Respondents (at 10) say this statement was "dicta," because "[s]cienter was discussed only hypothetically" after the Fifth Circuit had "found no actionable 'misstatement.'" Not so. The plaintiffs there pointed to "several statements" that they claimed violated the securities laws, and the court needed to "evaluate the scienter allegations pertinent to *each*." 565 F.3d at 208 (emphasis added). So the court marched through each statement, ultimately concluding that the allegations failed because they "support at most only a permissible inference of scienter," not the "strong inference" of scienter that the PSLRA requires. *Id.* at 212. The court's conclusion about one "accurate[]" statement, BIO 10 (quoting 565 F.3d at 211), did not affect the need to address scienter as to all the others. Respondents ignore that aspect of the Fifth Circuit's holding.

Respondents' treatment of the Second Circuit's longstanding case law requiring scienter is similarly convoluted. They do not dispute that the Second Circuit squarely held in *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.* that "mere[ly] negligent conduct" does not give rise to a private damages claim under Section 14(e). 480 F.2d 341, 362-63 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973). Instead, they just assert (at 7) it is "obvious" that *Chris-Craft* is inconsistent with *Ernst & Ernst* and *Aaron*. But here again, they are just arguing the merits. And, in any event, in *Fluor*, the Second Circuit declared—years after *Aaron* and *Ernst & Ernst*—that it remained "well settled in this Circuit that scienter is a necessary element of a claim for damages under § 14(e)." 808 F.2d at 961.

Meantime, courts within the Second Circuit have consistently applied the Second Circuit's scienter requirement for Section 14(e). *See, e.g., In re Tangoe,*

Inc. Stockholders Litigation, 333 F. Supp. 3d 77, 107 (D. Conn. 2018) (while "the Ninth Circuit has abandoned the requirement of pleading scienter for claims under Section 14(e), neither the Supreme Court . . . nor the Second Circuit has abandoned scienter as an element . . . under Section 14(e), and this Court therefore will continue to apply the current law in this Circuit"); *Sodhi v. Gentium S.p.A.*, No. 14-CV-287 (JPO), 2015 WL 273724, at *2 n.7 (S.D.N.Y. Jan. 22, 2015) (rejecting negligence standard "because the Second Circuit has squarely held that scienter is required under Section 14(e)" (citing *Fluor*, 808 F.2d at 961)); *see also, e.g.*, *Soueidan v. Breeze-Eastern Corp.*, No. 16 Civ. 0015 (ER), 2017 WL 627456, at *5 (S.D.N.Y. Feb. 15, 2017).

Respondents' objections to what they call the Sixth Circuit's "sparse analysis" (at 11), the Third Circuit's "thin analysis" (at 12), and the Eleventh Circuit's "(sparse) discussion" (at 13) are also unpersuasive. When it comes to conflicts of authority, what matters is the holding of the decision, not style points. And none of their attacks on the reasoning of those court of appeals decisions can change the undeniable fact that they all—every last one of them—held that mere negligence is not sufficient to support a claim for damages under Section 14(e).

Respondents seem to suggest (at 2) that there is no conflict until another circuit *disagrees with the Ninth*. But the Ninth Circuit's decision to "part[] ways," App. 20a, with the uniform precedent that had existed on this issue across the country for the half-century since enactment of Section 14(e) creates a classic circuit conflict. That conflict plainly warrants review.

2. Shifting gears, Respondents argue (at 24) that, "[a]ll else aside, the question presented lacks

sufficient importance to warrant further review." Here again, Respondents' position lacks credibility. As the Chamber of Commerce (at 4) has explained, "[t]he difference between negligence and scienter matters a great deal in securities litigation," and lowering the standard to negligence for Section 14(e) will impose added costs for "American companies when they engage in mergers and acquisitions transactions that involve tender offers—transactions of great importance to the American economy." *See also* SIFMA Amicus Br. 2 (this case is "of vital importance to SIFMA and its members").

a. Respondents say (at 25) that concerns about abusive litigation are "overblown," because "Plaintiffs must cross multiple thresholds to survive a motion to dismiss." But as this case shows, the scienter element is hugely important. Indeed, scienter is often the most straightforward way to weed out dubious securities claims early, without having to delve into trickier issues like materiality. *See* App. 34a n.3. The heightened pleading standard that Congress adopted for scienter in the PSLRA underscores this critical role scienter plays in securities litigation.

Respondents also suggest (at 25) that because securities claims are "difficult to prove" generally, lowering the standard to mere negligence is not really going change anything. That claim defies reality. Indeed, as Judge Friendly observed, the consequences of such a shift are "frightening." *SEC v. Texas Gulf Suplur Co.*, 401 F.2d 833, 866-67 (2d Cir. 1968) (concurring), *cert. denied*, 394 U.S. 976 (1969).[1] And

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[1] Respondents point (at 24 n.14) to Judge Friendly's subsequent opinion in *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973). But *Gerstle* involved Section 14(a), not

whatever is true for the ultimate disposition of such claims, this shift will minimize the ability to strike dubious claims at the dismissal stage, allowing plaintiffs (due to the prospect of "extensive discovery and the potential for uncertainty and disruption in a lawsuit") "to extort settlements from innocent companies." *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008).

Eliminating a scienter requirement also will open the doors to a whole new class of defendants. As SIFMA explains (at 20), the scienter element has traditionally prevented application of Section 14(e) to financial advisors or commentators on transactions, who, unlike, say, members of a board of directors, have no direct interest in the transaction and thus no motive for fraud. But the Ninth Circuit's new negligence standard will expose that additional group of defendants to suit for providing negligent advice to their clients or even to the public at large.

b. Respondents' attempt (at 25-26) to dismiss the forum shopping problem created by the decision below is also unpersuasive. The point is not why *this case* was filed in the Ninth Circuit (BIO 26); it is whether plaintiffs will flock to the Ninth Circuit if the decision is allowed to stand. Of course they will. The Ninth Circuit was already a haven for securities claims. Pet. 23. And in the first half of 2018, there were 15 percent *more* merger-related filings in the Ninth Circuit than

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Section 14(e). And pointing to the different language and history of Section 14(e), Judge Friendly specifically noted the Second Circuit's ruling in *Chris-Craft* that "scienter must be proved" under Section 14(e). 478 F.2d at 1299 & n.17. Moreover, he reiterated the concern that imposing "too liberal a standard with respect to culpability," like negligence, could result in "almost unlimited liability." *Id.* at 1300.

in the same period a year earlier, and nearly *three times* as many as in the same period in 2016. *See* Cornerstone Research, *Securities Class Action Filings—2018 Midyear Assessment* 10 (2018), http://bit.ly/Cornerstone2018MYR.

Eliminating the scienter requirement for Section 14(e) claims will only accelerate this trend. Take, for instance, a recent complaint filed in the Central District of California in *Adie v. Black Box Corp.* Class Action Complaint, No. 18-cv-02537 (C.D. Cal. Nov. 30, 2018), ECF No. 1. The case involves a merger between a Singaporean company and a Delaware corporation that has its "principal executive offices" in Pennsylvania. *Id.* at 3. The press release announcing the merger was bylined "Dallas, Mumbai, Singapore, and Pittsburgh." *Id.* at 6 (formatting altered). So why did plaintiffs file their class action in California? No doubt because the Ninth Circuit is the only place in the country with a negligence standard—a standard touted half-a-dozen times in the course of the plaintiffs' 15-page complaint.

In any event, even if forum shopping were *not* a serious concern, the fact is that the nation's largest forum for securities class actions (the Ninth Circuit) has now adopted an interpretation of Section 14(e) expressly rejected by the second and third largest fora for such claims (the Second and Third Circuits). That conflict cries out for resolution.

c. Respondents' half-hearted attempt (at 30) to make something out of the "interlocutory posture" of this case also fails. This Court routinely grants securities cases in the exact same posture as this one. *See, e.g.*, *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015);

Chadbourne & Parke LLC v. Troice, 131 S. Ct. 1058 (2014); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011).

Moreover, the Question Presented is outcome determinative. As the district court concluded, the scienter standard that applies in other circuits requires dismissal of the complaint here—without further proceedings. App. 46a-47a. There is no reason to require further litigation on remand about whether the complaint passes muster under the Ninth Circuit's new, negligence standard before this Court considers whether that standard applies at all. No doubt recognizing that, the Ninth Circuit itself has stayed further proceedings pending this Court's decision whether to grant certiorari.

3. The remainder of the opposition brief consists of Respondents' arguments on the merits. Those arguments simply underscore that the issue is squarely joined and that the Court can be assured of a full airing of the arguments if certiorari is granted. They provide no basis for denying review.

They are, however, revealing. For all of their insistence (at 14) that "the text here is unambiguous," Respondents eventually acknowledge (at 15) that "[t]he first clause" of Section 14(e)—which they argue should be treated as a freestanding basis for liability, as if hermetically sealed off from the rest of the same sentence—"does not expressly require . . . *any* specific state of mind." That fact, as the petition summarized (at 15-22), reinforces the need to look to the text and history of Section 14(e) *as a whole*—and that text and history confirms that Congress intended to adopt the same scienter standard as Rule 10b-5.

Respondents dispute this, of course, but not even they (or the Ninth Circuit) suggest that Section 14(e) could impose a strict liability standard. In other words, even Respondents appear to recognize that there must be *some* limit on when a false statement results in liability under Section 14(e). But Respondents fail to recognize that, if courts have the power to infer a cause of action for damages under Section 14(e), then that power carries with it a "special responsibility" to "mold [the] liability fairly." *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 428 (6th Cir.), *cert. denied*, 449 U.S. 1067 (1980). Adopting a negligence threshold for Section 14(e) abuses that responsibility and, indeed, calls into question the entire enterprise of inferring a private right of action under Section 14(e) to begin with.

Contrary to Respondents (at 28), Petitioners presented exactly that argument to the Ninth Circuit below. While Ninth Circuit precedent made it futile to dispute the existence of an inferred cause of action at the panel stage, Petitioners argued at the rehearing stage that "if Section 14(e)'s implied right of action had to sweep in negligence, that would be grounds for *eliminating* it, not expanding it." CA9 Petition for Rehearing En Banc at 14.

If this Court grants certiorari, it could decide that courts erred in inferring a private damages remedy to begin with. That issue is subsumed within the question of what the contours of such an inferred action are. But to resolve the Question Presented and restore uniformity and predictability to Section 14(e) litigation the Court need only hold that the Ninth Circuit erred in ruling that any inferred right of action under Section 14(e) extends to mere negligence. And ultimately, how to resolve this case

is a question for the merits. It is no reason to allow the Ninth Circuit's unprecedented decision to stand.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members, and indirectly

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel contributed money to fund the brief's preparation or submission. Counsel of record for the parties received notice at least ten days before the due date of *amicus*'s intent to file this brief, and all parties have consented to the filing of this brief.

represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases that raise issues of concern to the nation's business community, including cases under the federal securities laws.

The Chamber has a strong interest in this case because private securities class action litigation imposes a significant burden on its members and adversely affects their access to capital markets. In particular, its members frequently engage in mergers and acquisitions transactions. As a result, they face precisely the sorts of lawsuits that now invariably attend such transactions—including lawsuits brought in federal court under provisions of the federal securities laws, such as Section 14(e) of the Securities Exchange Act of 1934, the provision at issue here. By holding that private claims under Section 14(e) may be pleaded and proven by meeting only a negligence standard instead of a scienter standard, the decision below threatens to increase the litigation burdens faced by the Chamber's members. This case presents an appropriate opportunity for the Court to address that holding, and, indeed, for the Court to decide whether Section 14(e) affords any basis for private litigation at all.

SUMMARY OF ARGUMENT

The petition is absolutely right that there is a flat-out circuit split on the question of what state of mind is required to plead and prove a private claim for damages under Section 14(e) of the Securities Exchange

Act of 1934. In the decision below, the Ninth Circuit held that negligence sufficed. Pet. App. 2a, 20a. At least six other circuits—the Second, Third, Fifth, Sixth, Eighth, and Eleventh—disagree and require scienter. Pet. App. 10a–15a, 20a; Pet. 12–14; *Feldbaum* v. *Avon Prods., Inc* , 741 F.2d 234, 237 (8th Cir. 1984).

Subsumed within that question, however, is an even more fundamental issue that the Court should grant certiorari to address: whether a private right of action under Section 14(e) even exists *at all*. Pet. 20. Section 14(e) contains no private right, not even a hint of one. And when it comes to inferring private rights, this Court "swor[e] off the habit of venturing beyond Congress's intent" some four decades ago, and has repeatedly rebuffed "invitation[s] to have one last drink" ever since. *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001). In inferring a private right under Section 14(e), the courts of appeals have simply ignored this Court's post-1975 precedents on private rights of action. Those precedents foreclose any recognition of a private right under Section 14(e).

For this Court to recognize that Congress created no private right of action under Section 14(e) would not, as a practical matter, substantially alter the status quo before the decision below. Tendering shareholders could still pursue claims of fraud under Section 10(b) and Rule 10b–5, which require scienter. Beyond this, as the tortuous history of Section 10(b) and Rule 10b–5 illustrates, inferring a private right under Section 14(e) could once again require this Court repeatedly to guess what Congress's hypothetical intent would have been in defining the scope of a cause of action Congress never intended to create—an awkward and difficult task, to say the least.

In any event, regardless of the ground upon which the Court may decide it, this case is unquestionably an important one. The difference between negligence and scienter matters a great deal in securities litigation. Reducing the state-of-mind requirement to negligence makes cases harder to dismiss, and thus increases their settlement value significantly. In turn, that has the effect of substantially increasing the costs faced by American companies when they engage in mergers and acquisitions transactions that involve tender offers—transactions of great importance to the American economy. Whether or not it chooses to decide whether a Section 14(e) private right should exist, the Court should hear this case.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SIX OTHER CIRCUITS ON WHETHER ANY IMPLIED RIGHT OF ACTION UNDER SECTION 14(e) MAY BE BASED MERELY UPON NEGLIGENCE.

The Ninth Circuit acknowledged that it "part[ed] ways from [its] colleagues in five other circuits by holding "that Section 14(e) of the Exchange Act" imposes a negligence standard." Pet. 20a. And indeed, as both the Ninth Circuit and petitioners explain at length, decisions from the Second, Third, Fifth, Sixth, and Eleventh Circuits all require scienter—and thus directly conflict with the decision below. Pet. App. 10a–15a, 20a; Pet. 12–14. There is yet even another circuit in conflict—the Eighth, which has held that "some element of deception or misrepresentation"—"'intentional ... conduct designed to deceive or defraud investors'"—"is essential to a valid Section 14(e) claim." *Feldbaum*, 741 F.2d at 237.

For the reasons explained in the petition, this seven-circuit split, without more, urgently necessitates this Court's review.

II. THE DECISION BELOW, BY RECOGNIZING A PRIVATE RIGHT OF ACTION UNDER SECTION 14(e), CONFLICTS WITH THIS COURT'S PRIVATE-RIGHT JURISPRUDENCE.

But there is another reason why the Court should hear this case. The Ninth Circuit's holding, and those of other circuits recognizing a private right of action under Section 14(e), contravene over four decades of decisions of this Court governing the judicial creation of private rights of action—decisions that make clear that "[i]f the statute itself does not 'displa[y] an intent' to create 'a private remedy,' then 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1856 (2017) (quoting *Sandoval*, 532 U.S. at 286–87). Section 14(e) contains no express right of action in its text, and nothing in the statute otherwise suggests any Congressional intent to create such a right. The Court should grant certiorari to conform the lower courts' treatment of Section 14(e) to the law this Court has long pronounced on private rights of action.

A. Since 1975, this Court has made clear that private rights of action may not be inferred without an indication of Congressional intent.

"In the mid-20th century, ... the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose," and so, "as a routine matter with respect to

statutes, the Court would imply causes of action not explicit in the statutory text itself." *Abbasi*, 137 S. Ct. at 1855 (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)). But the Court has taken far "more restrictive views on private rights of action in recent decades." *Unite Here Local 355* v. *Mulhall*, 571 U.S. 83, 85 (2013) (Breyer, J., dissenting from dismissal of writ of certiorari as improvidently granted). "The high-water mark for implied causes of action came in the period before [this] Court's 1975 decision in *Cort* v. *Ash*"—but ever since then, the "Court has been very hostile to implied causes of action." *Johnson* v. *Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) (Kavanaugh, J.); *see Cort* v. *Ash*, 422 U.S. 66, 77–85 (1975).

The reason for this hostility is that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"—a point that this Court has "'recently and repeatedly'" emphasized in numerous "precedents [that] cast doubt on the authority of courts to extend or create private causes of action." *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004)). Indeed, "when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis." *Abassi*, 137 S. Ct. at 1857. And because "[d]eciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law," "the right answer" as to who should do that "'most often will be Congress.'" *Jesner*, 138 S. Ct. at 1413 (Gorsuch, J., concurring in part and concurring in the judgment; quoting *Abassi*, 137 S. Ct. at 1857).

Accordingly, under the approach the Court has taken toward inferring rights of action for over four decades now, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286. Thus, "what must ultimately be determined is whether Congress intended to create the private remedy asserted, as [the Court's] decisions have made clear." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15–16 (1979). "Statutory intent on this latter point is determinative," for "[w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter." *Sandoval*, 532 U.S. at 286–87.

B. There is no basis to infer a private right under Section 14(e).

Under these standards, the Ninth Circuit's recognition of a private right of action under Section 14(e) is erroneous, and this Court should grant certiorari to hold precisely that.

The Ninth Circuit is one of several courts of appeals that have inferred a right of action under Section 14(e)—but not one of those courts has properly applied this Court's post-*Cort* v. *Ash* case law to Section 14(e). The circuits that initially inferred a private right of action under that section did so not long before the "*ancien regime* ... for discerning and defining causes of action" fell in 1975. *Sandoval*, 532 U.S. at 287. These courts simply *assumed*, without analysis, that such a private right existed, and went straight to the question of identifying who had standing to assert it. *See, e.g.*, *Elec. Specialty Co.* v. *Int'l Controls Corp.*, 409 F.2d 937, 946 (2d Cir. 1969); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 595–

96 (5th Cir. 1974). In keeping with the law at the time, these courts saw "no need to try to discover 'supposed legislative intent.'" *Chris-Craft Indus., Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 361 (2d Cir. 1973).

But even after 1975, the courts of appeals failed to come to grips with the changed law governing private rights of action. They continued to "allow[] suits for private enforcement of section 14(e)"—and did so "without extensive discussion." *Plaine* v. *McCabe*, 797 F.2d 713, 717 n.7 (9th Cir. 1986). The courts of appeals simply assumed, or continued to assume, the existence of a right of action under Section 14(e) in favor of shareholders without *any* analysis under this Court's cases *at all*. *See, e.g.*, *Gearhart Indus., Inc.* v. *Smith Int'l, Inc.*, 741 F.2d 707, 714 (5th Cir. 1984); *Feldbaum* v. *Avon Prods., Inc.*, 741 F.2d 234, 236–38 (8th Cir. 1984); *Polinsky* v. *MCA Inc.*, 680 F.2d 1286, 1290–91 (9th Cir. 1982); *Staffin* v. *Greenberg*, 672 F.2d 1196, 1201–07 (3d Cir. 1982); *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 430–31 (6th Cir. 1980); *Ind. Nat'l Bank* v. *Mobil Oil Corp.*, 578 F.2d 180, 184–85 (7th Cir. 1978); *Stull* v. *Bayard*, 561 F.2d 429, 432 (2d Cir. 1977).

Had these courts correctly conducted the analysis they elided, they would have concluded that, under this Court's precedents, no basis exists for inferring a private right of action under Section 14(e). In *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 24–42 (1977), the Court held that no implied right of action existed in favor of defeated tender offerors under Section 14(e). The Court in *Piper* expressly "limited" its "holding" to whether such offerors could sue, and "intimate[d] no view" on "[w]hether shareholder-offerees ... have an implied cause of action under § 14(e)." *Id.* at 42 n.28. Still, the Court's reasoning in

Piper, along with its reasoning in later cases—in particular, *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568–79 (1979), which found no private right for damages under Section 17(a) of the Exchange Act, and *Transamerica*, 444 U.S. at 19–24, which found no private right for damages under Section 206 of the Investment Advisers Act of 1940—plainly forecloses any recognition of a private right of action under Section 14(e).

In deciding whether a private right should be inferred, the judicial "task is limited solely to determining whether Congress intended to create the private right of action asserted by [the plaintiffs]. And as with any case involving the interpretation of a statute, [the] analysis must begin with the language of the statute itself." *Touche Ross*, 442 U.S. at 568. Section 14(e), on its face, "makes no provision whatever for a private cause of action." *Piper*, 430 U.S. at 24. It contains simply a prohibition—a prohibition against, among other things, making "untrue statement[s] of material fact, "omit[ting] to state ... material fact[s] necessary in order to make ... statements made ... not misleading," and "engag[ing] in any fraudulent, deceptive, or manipulative acts or practices," all "in connection with any tender offer or request or invitation for tenders." 15 U.S.C. § 78n(e). Thus, Section 14(e) "does not, by its terms, purport to create a private cause of action in favor of anyone." *Touche Ross*, 442 U.S. at 569. Section 14(e) "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." *Transamerica*, 444 U.S. at 19.

Nor does the fact that Section 14(e) proscribes certain conduct ("fraudulent activities 'in connection with any tender offer,'" *Piper*, 430 U.S. at 38 (quoting 15 U.S.C. § 78n(e)), or the fact that it "protect[s] [a] class

of shareholder-offerees," *id.*, establish a private right of action. In *Transamerica*, Section 206 of the Investment Advisers Act similarly prohibited fraudulent conduct: Among other things, it "broadly proscribes fraudulent practices by investment advisers, making it unlawful for any investment adviser 'to employ any device, scheme, or artifice to defraud ... [or] to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.'" 444 U.S. at 16 (quoting 15 U.S.C. § 80b–6). In addition, Section 206 protected a class of investor-victims; as the Court put it, "Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited." *Transamerica*, 444 U.S. at 24.

None of that mattered. "[T]he mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf." *Id.*; *see also Touche Ross*, 442 U.S. at 578 ("the mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf"). The Court concluded: "The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end." *Transamerica*, 444 U.S. at 24.

The inquiry could indeed end here for Section 14(e) as well, but more can be said. The legislative history of the Williams Act of 1968, which added Section 14(e) to the Exchange Act, contains no suggestion that any members of Congress believed that the legislation they were enacting would create any right to sue. *See, e.g.*, *Piper*, 430 U.S. at 26–34 & n.20; H.R. REP. NO. 90–

1711, at 7–14 (1968); S. REP. NO. 90–550, at 7–11 (1967).

As for what Congress actually enacted, the remainder of the Williams Act—as well as the rest of the Securities Exchange Act and the securities laws generally—confirm that no right of action should be judicially created for Section 14(e). For one thing, the securities laws are chock-full of prohibitions of various sorts against fraud and deception and manipulation and misstatements and omissions and failures to comply with a myriad of regulations, and they contain as well a potpourri of prescriptions designed to protect investors. But apart from the provisions in the securities laws that expressly provide for private rights to sue, no provision in those laws gives any more or less of an indication of a congressional intent to authorize private suits than does Section 14(e). In *Touche Ross*, the Court quite understandably refused to infer a right of action in part because to do so would mean "that virtually every provision of the securities Acts gives rise to an implied private cause of action"—a result the Court "decline[d]" to accept. 442 U.S. at 560. That same logic should apply to Section 14(e) as well.

At the same time, the express rights of action in the securities laws themselves establish why an inferred right under Section 14(e) must be rejected. Today there are "eight express liability provisions contained in the 1933 and 1934 Acts": Sections 11, 12, and 15 of the Securities Act of 1933, and Sections 9, 16, 18, 20, and 20A of the Securities Exchange Act of 1934. *Musick, Peeler & Garrett* v. *Emp'rs Ins. of Wausau*, 508 U.S. 286, 296 (1993); *see* 15 U.S.C. §§ 77k, 77*l*, 77*o*, 78*i*, 78p, 78r, 78t, 78t–1. Each of the express rights very precisely defines who may sue, whom they may sue,

for what, and under what circumstances. As this Court has repeatedly recognized, these are "carefully drawn express civil remedies" that contain "carefully drawn procedural restrictions" that "Congress regarded ... as significant." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195, 210 & n.30 (1976); *see also Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 384 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 380 (1982); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975).

These express rights of action thus cut strongly against judicially engrafting an additional one onto Section 14(e). "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica*, 444 U.S. at 19. And "[o]bviously, ... when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Transamerica*, 444 U.S. at 22 (quoting *Touche Ross*, 442 U.S. at 572). Congress didn't do so in Section 14(e), or, for that matter, anywhere in the Williams Act—which means that it didn't mean to. For "it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Id.* at 20 (quoting *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 742 (1979) (Powell, J., dissenting)). "The fact that it enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability on a private suitor." *Id.* at 21.

That the courts of appeals have ignored the Court's precedents for so long, moreover, should not deter the Court from applying them here. In the case of Section 10(b) and Rule 10b–5, as to which the Court, of course,

has recognized an inferred private right, "this Court simply acquiesced in [a] 25-year-old acceptance by the lower federal courts of an implied action under § 10(b)." *Touche Ross*, 442 U.S. at 577–78 n.19. Most significantly, that acceptance occurred at a time when, under the governing law as set forth by this Court, judicial creation of private rights was "routine." *Abbasi*, 137 S. Ct. at 1855; *see Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) (one-sentence footnote acquiescing in 10(b)/10b–5 private right); *Kardon* v. *Nat'l Gypsum Co.*, 69 F. Supp. 512, 513–14 (E.D. Pa. 1946) (first judicial decision inferring 10(b)/10b–5 private right). No comparable history exists, however, for Section 14(e): This Court hit the brakes on inferring rights of action only seven years after Congress passed the Williams Act. *See Cort* v. *Ash*, 422 U.S. at 77–85. Just four years after that, as shown above, the Court effectively made clear that judges should not infer any more private rights of action under the federal securities laws. *See Touche Ross*, 442 U.S. at 568–79; *Transamerica*, 444 U.S. at 19–24. Indeed, by then the Court had "sworn off the habit of venturing beyond Congress's intent" altogether. *Sandoval*, 532 U.S. at 287.

C. Inferring a private right under Section 14(e) is unnecessary because Section 10(b) will continue to provide a remedy for fraud in tender offers.

If it is rejected by this Court, the Section 14(e) private right would not be sorely missed by anyone. Indeed, its elimination would work no substantial change in the conduct of securities litigation in the lower courts. As so many courts have been wont to say, "[t]he elements of a claim under Section 14(e), which applies to tender offers, are identical to the Section

10(b)/Rule 10b–5 elements." *Flaherty & Crumrine Preferred Income Fund, Inc.* v. *TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009) (citing *Smallwood*, 489 F.2d at 605), *quoted in* Pet. App. 14a. At least until the decision below, the courts inferring a Section 14(e) private right had understood that the elements of a claim "are essentially the same under § 14(e) as under Rule 10b–5," "except that § 14(e) applies to tender offers rather than the purchase or sale of securities." *Gulf & W. Indus., Inc.* v. *Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 696 (2d Cir. 1973). Because a tender of shares into a tender offer plainly constitutes a sale of securities under Section 10(b), the private right of action under Section 10(b) and Rule 10b–5 provides a full remedy for claims of fraud by tendering shareholder-offerees.[2]

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[2] Some courts have suggested, at least in dicta, that *non*tendering shareholders may sue under Section 14(e) if, somehow, they were deceived into *not* tendering. *See, e.g.*, *Stull*, 561 F.2d at 432; *Smallwood*, 489 F.2d at 596. To permit such claims, however, would inadvisably disregard the purchaser-seller rule imposed by this Court under Section 10(b) in *Blue Chip Stamps*, 421 U.S. at 731–55. That rule is based not on the text of Section 10(b), but on the Court's concern that "vexatious litigation" would ensue if plaintiffs were allowed to assert fraud claims after they had "decided *not* to purchase or sell stock"—claims not "capable of documentary verification." *Id.* at 740, 746. In any event, such claims under Section 14(e) appear to be few and far between, and it is easy to see why. Suppose a company were subjected to a hostile tender offer at $10 per share, and its management, unscrupulously seeking to defeat the tender offer, disseminated false information that pumps the stock up to $12—which had the desired effect because no rational shareholder would tender at $10 when she could sell into the market at $12. After all this, *no one* could bring a viable Section 14(e) non-tendering holder claim: Anyone who sold into the market at $12 would obviously have *no* damages, having profited from the fraud; and anyone who *refused* to sell into the market at the *higher* $12 price could not credibly

Beyond this, the proper application by this Court of its private-right precedents to Section 14(e) would promote stability in the law. Litigants and courts could rest assured that exceptions to those precedents, and to other doctrines in other areas of law, will not be created through oversights or accidents of history in the lower courts. In addition, as the tortuous, decades-long history of defining the Section 10(b)/Rule 10b–5 private right makes clear, the judicial manufacture of a private right under the securities laws brings with it the need to answer a seemingly endless array of "questions about the elements of the [inferred] liability scheme"—questions that "ha[ve] posed difficulty," of course, "because Congress did not create [the inferred] cause of action and had no occasion to provide guidance about [its] elements." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172–73 (1994).[3] As this case makes clear, there can be no guarantee that lower courts will continue to define the contours of Section 14(e) consistently with those of Section 10(b) and Rule 10b–5—which means

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claim that they *would* have sold to the tender offeror at the *lower* $10 price. The only shareholders with a potentially viable securities-fraud claim would be those who *purchased* in the open market at the fraudulently inflated $12 price. Assuming they ultimately suffered a loss, these *purchasers* would have a claim under Section 10(b) and Rule 10b–5.

[3] As one commentator put it in 2014: "The task of defining the implied section 10(b) private right of action ... falls to the judiciary, and the complexity of that task is reflected, in part, by the fact that there are at least twenty-eight Supreme Court opinions interpreting the scope of the section 10(b) right of action. Defining the elements of this cause of action and continuing to manage its evolution have consumed a non-trivial portion of the Supreme Court's energy." Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 BUS. LAW. 307, 324–26 & n. 85 (2014) (citing cases).

that the "awkward task of discerning [what standards] Congress intended courts to apply to a cause of action it never knew existed" may continue to arise. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 359 (1991). By granting review and applying its private-right precedents here, this Court can obviate the heavy burden of determining the elements of yet another complex, judicially-created liability scheme.

III. THE QUESTION PRESENTED BY THIS CASE IS IMPORTANT.

Whether it tackles the threshold private-right issue or not, the Court should review this case because of its exceptional importance. For decades, this Court has frequently acknowledged the threat of abuse and unfair settlement pressures that often attend securities class actions. "[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). "[I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." *Blue Chip Stamps*, 421 U.S. at 740. Indeed, "[t]he very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Id.*

These concerns underscore the importance of the difference between the scienter standard imposed by most circuits in private cases under Section 14(e) and

the negligence standard selected by the Ninth Circuit here. Indeed, in deciding that scienter was required under Section 10(b), this Court, while relying on the text of the statute for its holding, also observed that a negligence standard could lead to an "'inexorable broadening of the class of plaintiff who may sue in this area of the law'" and "'ultimately result in more harm than good.'" *Ernst & Ernst*, 425 U.S. at 214–15 n.33. It was for much the same reason, indeed, that Congress enacted the requirement in the Private Securities Litigation Reform Act of 1995 that "plaintiffs must 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (quoting 15 U.S.C. § 78u–4(b)(2)). In the case of Section 10(b), of course, that means scienter. Congress intended that pleading standard as a "procedural protection[] to discourage frivolous litigation," namely, "abusive and manipulative securities litigation," "lawyer-driven lawsuits" in which "innocent parties are often forced to pay exorbitant 'settlements,'" including "extortionate 'settlements' ... extracted from issuers." H.R. CONF. REP. 104–369, at 32 (1995). Congress considered that standard ultimately to be a means "to protect investors, issuers, and all who are associated with our capital market" from such litigation. *Id.*.

The need for strictly enforcing a scienter standard under Section 10(b) applies with equal force under Section 14(e), and to litigation involving tender offers. One well-publicized phenomenon in securities litigation in recent years has been the growth in frivolous and abusive lawsuits attending the announcement of mergers and acquisitions, transactions that frequently involve tender offers as

a component. As the U.S. Chamber of Commerce's Institute for Legal Reform recently explained:

> Here's how it works: Just about every merger or acquisition that involves a public company and is valued over $100 million—91% of all such transactions in 2010 and 2011—becomes the subject of multiple lawsuits within weeks of its announcement. Because the parties to the merger want to close their deal and begin to reap the economic benefits of the combination, the vast majority of these lawsuits settle quickly—within three months—and typically provide little or no benefit for shareholders. But the settlements do award large attorneys' fees to the lawyers who filed the lawsuits.

U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, THE TRIAL LAWYERS' NEW MERGER TAX 1 (2012) ("MERGER TAX"), *available at* http://bit.ly/2qAaVUZ.

This genre of litigation quickly became a growth industry. The number of such cases "quadrupled from 2005 to 2010." *Id.* at 3; *accord* Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 371 (2011). By 2010, 90 percent of mergers-and-acquisition transactions faced this sort of litigation. CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2017 M&A LITIGATION 2 (2018) ("CORNERSTONE 2017 M&A LITIGATION REVIEW"), available at https://stanford.io/2QvQHa4. And the phenomenon continues to this day. *See* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, A RISING THREAT: THE NEW CLASS ACTION RACKET THAT HARMS INVESTORS AND THE ECONOMY 7–12 (2018) ("RISING THREAT"), *available at* http://bit.ly/2FlslPf.

At first, the cases mostly involved state-law claims brought in state courts, principally in Delaware. But as the years passed, and the abuses became apparent, the Delaware Chancery Court clamped down. Ultimately that court made clear that it would no longer rubber-stamp what it called "'disclosure settlements,' ... the most common method for quickly resolving stockholder lawsuits that are filed routinely in response to the announcement of virtually every transaction involving the acquisition of a public corporation." *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 887 (Del. Ch. 2016). The Delaware court noted that these settlements "rarely yield genuine benefits for stockholders." *Id.* Declaring that it would be "increasingly vigilant" in scrutinizing such settlements, the Court stated that it would take steps to "guard against potential abuses in [attorneys'] fee demands for mooted representative actions." *Id.* at 887, 898. Other courts, including one federal court of appeals addressing a settlement of state-law claims, have followed suit. *See, e.g., In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016) (Posner, J.).

The toughening standards in the Delaware courts over recent years has incentivized plaintiffs' lawyers to migrate to other state courts—and also to federal courts, and also to bring more federal claims. This case exemplifies that trend. By 2017, "the number of M&A deals litigated in federal court increased 20 percent, while state court filings declined." CORNERSTONE 2017 M&A LITIGATION REVIEW, *supra*, at 4. Also by 2017, "74% of M&A deals over $100 million triggered federal securities suits, a 500% increase from 2009." RISING THREAT, *supra*, at 7. And again by 2017, 44 percent of all merger-related disclosure litigation was settled in federal courts, and 100 percent of all mootness attorneys' fees were paid in federal

courts. Matthew D. Cain, *et al.*, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 627 (2018).

If the Ninth Circuit's decision is allowed to stand, this dramatic migration would continue—and would funnel with accelerating speed into the Ninth Circuit. The Ninth Circuit's imposition of a negligence standard under Section 14(e), combined with the broad venue provision contained in the 1934 Act, 15 U.S.C. § 78aa(a), means that any securities plaintiffs' lawyer would be wise to—indeed, would be foolish not to—file an acquisition-related disclosure case in a federal district court in the Ninth Circuit, if any part of the transaction involves a tender offer. The Ninth Circuit's negligence standard essentially makes the PSLRA's heightened pleading standard inoperative, because the whole point of that standard was to require "facts evidencing *scienter*" to be pleaded "with particularity." *Tellabs*, 551 U.S. at 313 (emphasis added). As a result, cases will become extremely difficult to dismiss, which in turn greatly increases their settlement value. So the Ninth Circuit would clearly be the place to go.

At the same time, the cost of executing beneficial business combinations that promote economic growth would increase. Even as matters previously stood before the merger-litigation boom began, securities litigation had already imposed a significant burden on the American economy. For example, in 2012, securities class actions generally led to $2.9 billion in settlements. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2012 REVIEW AND ANALYSIS 3 (2013), *available at* https://stanford.io/2RJHon3. Litigation attending mergers and acquisitions not only adds to that overall burden, *see* RISING THREAT, *supra*,

at 9–10, but also focuses it on a critical choke point in the American economy—the movement of corporate assets to their highest, best, most productive, and most cost-efficient use. The effective result is a "'litigation tax'" on each acquisition—an "additional cost [that] may transform what would have been an economically sensible pro-consumer deal into a non-starter—depriving shareholders, workers, and the economy as a whole of the benefits that the deal would have produced." MERGER TAX, *supra*, at 2. As "[f]or deals that go forward, the 'tax' diverts hundreds of millions of dollars away from shareholders and workers and into the pockets of trial lawyers." *Id.*

In short, the Court should grant certiorari and—either by holding that scienter is required for a private Section 14(e) claim, or by holding that no private right under that section exists at all—prevent the substantial economic harm that the decision below threatens to enhance. And the Court should address the matter now, before the flood of this sort of litigation into the Ninth Circuit becomes too great.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 18-459

IN THE

Supreme Court of the United States

EMULEX CORPORATION, ET AL.,
Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Federal Cases

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Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455 (2013) 2

Biotechnology Value Fund, L.P. v. Celera Corp., No. C 13-03248 WHA, 2014 WL 988913 (N.D. Cal. Mar. 10, 2014) 21

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 21

Chadbourne & Parke LLP v. Troice, 571 U.S. 377 (2014) 2

Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973) 3, 22

Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 583 U.S. ___, 138 S. Ct. 1061 (2018) 1-2

In re Digital Island Sec. Litig., 357 F.3d 322 (3d Cir. 2004) 3, 16, 21, 22

Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011) 2

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 15-16, 23

Gabelli v. SEC, 570 U.S. 254 (2011) 2

In re Goodyear Tire & Rubber Co. Sec. Litig., No. CIV. A. 88-8633, 1993 WL 130381 (E.D. Pa. Apr. 22, 1993), *aff'd*, 16 F.3d 403 (3d Cir. 1993) 17

In re Hatteras Fin., Inc., S'holder Litig.,
286 F. Supp. 3d 727 (M.D.N.C. 2017) 13

Janus Capital Grp., Inc. v. First Derivative Traders,
564 U.S. 135 (2011) 21

Lorillard v. Pons,
434 U.S. 575 (1978) 22

Matrixx Initiatives, Inc. v. Siracusano,
563 U.S. 27 (2011) 2

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,
456 U.S. 353 (1982) 22

Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,
575 U.S. ___, 135 S. Ct. 1318 (2015) 2

Prudent Real Estate Tr. v. Johncamp Realty, Inc.,
599 F.2d 1140 (2d Cir. 1979) 16

Rosenfeld v. Time Inc.,
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2018 WL 4177938 (S.D.N.Y. Aug. 30, 2018) 13

SEC v. Ginsburg,
362 F.3d 1292 (11th Cir. 2004) 3, 21, 22

Schreiber v. Burlington N., Inc.,
472 U.S. 1 (1985) 16, 22

Seaboard World Airlines, Inc. v. Tiger Int'l, Inc.,
600 F.2d 355 (2d Cir. 1979) 16

Smallwood v. Pearl Brewing Co.,
489 F.2d 579 (5th Cir. 1974) 3, 22

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 20-21

TSC Indus., Inc., v. Northway, Inc.,
426 U.S. 438 (1976) 16, 17

United States v. Morton,
467 U.S. 822 (1984) 23

In re Walgreen Co. Stockholder Litig.,
832 F.3d 718 (7th Cir. 2016) 8, 13

State Cases

In re 3Com S'holders Litig.,
Civil Action No. 5067-CC,
2009 WL 5173804 (Del. Ch. Dec. 18, 2009) 19

Acevedo v. Aeroflex Holding Corp.,
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In re Aruba Networks, Inc. Stockholders Litig.,
No. 10765-VCL (Del. Ch. Oct. 9, 2015) 10

Assad v. World Energy Sols., Inc.,
No. 10324-CB (Del. Ch. Aug. 20, 2015) 10

Arnold v. Soc'y for Sav. Bancorp, Inc.,
650 A.2d 1270 (Del. 1994) 18

Dent v. Ramtron Int'l Corp.,
C.A. No. 7950-VCP, 2014 WL 2931180 (Del. Ch.
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Lee v. Pincus,
C.A. No. 8458-CB, 2014 WL 6066108 (Del. Ch.
Nov. 14, 2014) 20

Malpiede v. Townson,
780 A.2d 1075 (2001) 20

In re Micromet Inc. S'holders Litig.,
C.A. No. 7197-VCP, 2012 WL 681785 (Del. Ch.
Feb. 29, 2012) 18

In re Riverbed Tech., Inc. Stockholders Litig.,
No. 10484-VCG (Del Ch. July 27, 2015) 10

In re Trulia, Inc. Stockholder Litig.,
129 A.3d 884 (Del. Ch. 2016) ..... *passim*

In re Zale Corp. Stockholders Litig.,
C.A. No. 9388-VCP, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015) 20

Federal Statutes

15 U.S.C. § 78n(e) ..... *passim*

15 U.S.C. § 78aa(a) 14

Pub. L. No. 90-439, 82 Stat. 455 16

Rule

U.S. Sup. Ct. R. 37.2(a) 1

Secondary Sources

Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*,
11 Berkeley Bus. L.J. 55 (2014) 7, 9

Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*,
100 Iowa L. Rev. 465 (2015) 9

Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*,
71 Vand. L. Rev. 603 (2018) 7, 9

Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015*,
Berkeley Cent. for L. Bus. Econ. (Jan. 14, 2016), https://ssrn.com/abstract=2715890 12

Cornerstone Research, *Securities Class Action Filings: 2018 Midyear Assessment* (2018), https://www.cornerstone.com/Publications/Repor

ts/Securities-Securities-Class-Action-Filings%E2%80%942018-Midyear-Assessment 14

Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation* (2018), https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-of-Public-Companies-Review-of-2017-M-and-A-Litigation 9, 11, 12

Annual Report Statistics, Del. Division of Corps., https://corp.delaware.gov/stats/ 14

Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and A Proposal for Reform*, 93 Tex. L. Rev. 557 (2015) 8, 9

Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 Ala. L. Rev. 473 (2007) 17

NERA, *Recent Trends in Securities Class Action Litigation: H1 2018 Update* (July 18, 2018), http://www.nera.com/content/dam/nera/publications/2018/ Recent_SCA_Trends_2018_1H.pdf 13

NERA, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review* (Jan. 29, 2018), http://www.nera.com/content/dam/near/publications/2018/PUB_Year_End_Trends_Report_0118_final.pdf 12

NERA, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* (Jan. 23, 2017), https://www.nera.com/content/dam/near/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf 12

Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 Wash. U. L.Q. 417 (2003) 15

Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions*, 57 Vand. L. Rev. 1797 (2004) 7

Treatise

Thomas L. Hazen, *Treatise on the Law of Securities Regulation* § 1:16 (7th ed. 2017) 16

INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is the leading securities industry trade association, representing the interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA works to represent its members' interests locally and globally. SIFMA has offices in New York and Washington, D.C. and is the U.S. regional member of the Global Financial Markets Association.

On behalf of the industry's nearly one million employees, SIFMA advocates on issues affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA's mission is to support a strong financial industry while promoting fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. To further that mission, SIFMA regularly files *amicus* briefs in cases that raise issues of concern to securities industry participants. *See, e.g.*, *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 583 U.S. ___, 138 S. Ct. 1061

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of SIFMA's intent to file this *amicus curiae* brief, and all parties consented to the filing. This brief was not authored in whole or in part by counsel for any party, and no person or entity other than SIFMA, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

(2018); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. ___, 135 S. Ct. 1318 (2015); *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013); *Gabelli v. SEC*, 570 U.S. 254 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011).

The issues raised by Emulex's petition for certiorari in this case (the "Petition") are of vital importance to SIFMA and its members. The plaintiffs-side securities class action bar files lawsuits challenging the vast majority of U.S. public company merger transactions. These "merger objection" suits frequently focus on the financial advice provided to the seller's board of directors – stockholders allege that the financial advisors' analyses were flawed and accompanied by inadequate or incomplete disclosures. The financial analyses at issue in these "merger objection" class actions typically are provided by SIFMA members.

Until recently, stockholders filed most "merger objection" class actions in state court under theories based on state law, including disclosure obligations thereunder. Since early 2016, however, and for reasons discussed more fully below, stockholders have changed strategies and now are filing "merger objection" cases in federal court invoking § 14 of the Securities Exchange Act of 1934 (the "Exchange Act") rather than state disclosure law. The Petition here concerns § 14(e), the subsection of the statute governing mergers completed by tender offer. The Ninth Circuit's decision here, which assumes the existence of an implied private right of action and adopts a simple negligence standard for § 14(e)

claims, will have an enormous impact on the mergers and acquisitions industry and especially on financial advisors.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

In its opinion below, the Ninth Circuit became the first circuit to hold that claims under § 14(e) of the Exchange Act require a stockholder to plead and prove ordinary negligence, rather than scienter. In contrast, the Second, Third, Fifth, Sixth and Eleventh Circuits have long held that § 14(e), like § 10(b) of the Exchange Act and SEC Rule 10b-5, requires a showing of intentional fraud or scienter.[3] Given the importance of the federal securities laws to the proper functioning of the financial markets, this circuit split alone warrants this Court's attention.

The Court should grant the Petition for several additional reasons. ***First***, the elements of a § 14(e) claim have become critically important given recent developments in the "merger objection" litigation industry. Beginning in or around 2000, plaintiffs-side securities class action firms began filing an

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[2] This Court has never held that there is an implied private right of action under § 14(e). The Ninth Circuit has assumed that such a private right of action exists without expressly analyzing the issue. *See* App. 19a.

[3] *See SEC v. Ginsburg*, 362 F.3d 1292 (11th Cir. 2004); *In re Digital Island Sec. Litig.*, 357 F.3d 322 (3d Cir. 2004); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422 (6th Cir.), *cert. denied*, 449 U.S. 1067 (1980); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

increasing number of lawsuits challenging public company merger transactions. By 2015, more than 90% of all public company deals were targeted with abusive "merger objection" litigation. The vast majority of these cases were filed in state court, most frequently in Delaware.

In early 2016, however, the Delaware Chancery Court issued the landmark decision *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 885 (Del. Ch. 2016), which severely limited the ability of stockholders to bring frivolous "merger objection" litigation. To avoid the impact of the *Trulia* decision, stockholders began filing their "merger objection" suits in federal court, relying on § 14 of the Exchange Act. As a result, the number of "merger objection" cases in federal courts has doubled since 2016. "Merger objection" litigation has become a federal court and federal law problem that likely will be exacerbated by the Ninth Circuit's decision allowing stockholder plaintiffs to bring § 14(e) claims on a showing of mere negligence.

Second, the Ninth Circuit's outlier decision risks establishing a de facto national standard in § 14(e) cases. Under the Exchange Act, a plaintiff may file § 14(e) tender offer claims against a corporation in any district where the corporation "transacts business"; most public companies transact business and conduct tender offers across all 50 states. Stockholder plaintiffs, then, are likely to take advantage of the lower negligence standard for § 14(e) claims in the Ninth Circuit by filing their "merger objection" lawsuits there – even if a company is headquartered elsewhere, incorporated elsewhere, has its shares listed elsewhere, and does the majority of its business elsewhere.

Third, the Ninth Circuit's holding raises a significant risk of over-disclosure. Tender offer documents are already voluminous. Merger parties provide stockholders with exhaustive detail on the background of the proposed transaction, the reasons for the merger, and multiple financial analyses supporting the fairness of the purchase price. If participants in multi-billion dollar merger transactions can be held liable for damages under § 14(e) for inadvertently failing to include some disclosure item that a court determines in hindsight to be material, there is a risk that merger participants will err on the side of even more voluminous disclosure, making it more difficult for stockholders to make well-informed investment decisions.

Finally, and as discussed more fully in Petitioner's brief, the Ninth Circuit's decision is wrong on the merits. Courts have long held that § 14(e) is an anti-fraud provision designed to prevent knowing and intentional misconduct in connection with tender offers. With knowledge of those decisions, Congress adopted the Private Securities Litigation Reform Act of 1995 (the "PSLRA") and the Securities Litigation Uniform Standards Act ("SLUSA") without lowering the intent requirement for claims under § 14(e).

The Ninth Circuit's approach to § 14(e) is likely to encourage and permanently federalize frivolous "merger objection" litigation, harming the entire financial industry and imposing undue burden on federal courts. This Court should grant the Petition in order to reconcile the circuit split and, at the merits stage, hold that § 14(e) claims require a stockholder plaintiff to plead and prove scienter.

ARGUMENT

U.S. public companies implement M&A transactions through a variety of legal mechanisms. The mechanism chosen for any particular merger transaction depends on an array of factors, including tax, regulatory and financial issues. One common structure involves the buyer and the seller's board of directors agreeing to a merger and then seeking approval from the seller's stockholders through a proxy vote. When seeking stockholder approval, companies must provide extensive written disclosures regarding, among other things, the background and terms of the proposed transaction. The disclosures provided to stockholders in the proxy solicitation scenario are governed by state and federal law.

Another merger mechanism is the tender offer. In a tender offer, the buyer goes directly to the target's stockholders and offers to purchase their shares, typically at a premium to the prevailing market price. Tender offers may be used in connection with both unsolicited and negotiated mergers. Stockholder disclosures in the tender offer context are governed by state law as well as federal law, in particular § 14(e) of the Exchange Act and the SEC's rules promulgated thereunder.

Regardless of form, merger transactions are obviously significant events in the life of public companies, posing significant economic risks for boards of directors, management, employees, stockholders and creditors on both sides of merger transactions. Capitalizing on this risk, the plaintiffs-side securities class action bar has developed a litigation strategy that focuses on extracting quick settlements from merger participants by threatening

the ability of the parties to timely close on agreed transactions, even though the underlying claims lack merit and the settlements provide nothing of value to the shareholder classes.

I. THE NINTH CIRCUIT'S DECISION WORKS AGAINST *TRULIA* AND WILL INCREASE THE NUMBER OF FRIVOLOUS "MERGER OBJECTION" CASES FILED IN FEDERAL COURTS.

A. The Plaintiffs' Bar Adopts "Disclosure-Only" Settlements.

Beginning in or around the early 2000s, the plaintiffs' bar began challenging a significant percentage of public company mergers through shareholder class action litigation. *See, e.g.*, Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 Vand. L. Rev. 603, 610-11 (2018). The complaints in these "merger objection" cases often are nearly verbatim versions of prior complaints with only the parties' names changed, and they typically are filed within days of the announcement of the mergers. *See* Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions*, 57 Vand. L. Rev. 1797, 1827-28 (2004).

In these "merger objection" cases, the stockholder plaintiff generally alleges that the seller's board of directors sold the company for a price that was too low and through a sales process that was unfair in some way. *See* Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 Berkeley Bus. L.J. 55, 56-57, 68 (2014). Once the seller files the required public disclosures (*e.g.*, a proxy statement or tender offer recommendation), the stockholder

plaintiff alleges that the disclosures are false and misleading with respect to the background or terms of the transaction. *See* Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and A Proposal for Reform*, 93 Tex. L. Rev. 557, 565 (2015).

In a typical case, the stockholder plaintiff immediately files a motion for a temporary restraining order and a preliminary injunction, arguing that the court should enjoin the closing of the transaction until the disclosure document is corrected or supplemented. After creating the risk that a transformative bet-the-company transaction might be enjoined, the stockholder plaintiff takes advantage of that risk by making an offer to settle with the merger parties. The standard proposal is for a "disclosure-only" settlement: if the defendants make certain supplemental disclosures and pay plaintiffs' counsel a substantial fee award, plaintiffs will provide defendants with a broad class-wide release covering all alleged misconduct in connection with the challenged transaction. The stockholder class receives nothing more than the supplemental disclosures. As the Seventh Circuit has observed, such a "class action that yields fees for class counsel and nothing for the class" is "no better than a racket." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016).

Such offers are nevertheless difficult for the merger parties to refuse, no matter how meritless plaintiffs' claims are or how little value is provided to the class. Faced with the uncertainty, expense and distraction of litigation, and the risk (however small) that a court might enjoin a critical corporate transaction on the basis of an expedited litigation

record, many defendants choose to settle these "merger objection" cases. *See* Fisch et al., *supra*, at 565-66; Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 Iowa L. Rev. 465, 478 (2015) ("Settlements which only require disclosure constitute 55.1% of the settlement types in the sample and are the most common type of settlement.").

Although such settlements bring no economic value to the shareholders, and the additional disclosures are often trivial, the attorneys' fees have reached into the millions of dollars. *See* Cain et al., *supra*, at 624. Able to obtain large fees for little work, the plaintiffs' bar has made the filing of "merger objection" lawsuits increasingly routine. In 2008, approximately 54% of all public M&A deals were challenged. *See* Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation* (2018) at 2, https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-of-Public-Companies-Review-of-2017-M-and-A-Litigation (hereinafter "2017 Cornerstone Review"). This number rose sharply to 86% in 2009, and continued to rise until its peak of 94% in 2013. *See id.* The percentage of deals subject to suit hovered between 85% and 90% through 2015. *See id.*

These "merger objection" lawsuits are so common that they are viewed as a "merger tax" and part of the cost of doing M&A transactions. *See* Jeffries, *supra*, at 108 ("Through this overabundance of litigation, plaintiffs' attorneys have successfully attached what amounts to a transaction tax to an

overwhelming majority of large public company deals. Attorneys extort this tax – in the form of attorneys' fees – from defendant companies who fear their deals will die after being tied up in lengthy, often frivolous litigation.").

B. *Trulia* Eliminates Delaware as a Friendly Forum.

Prior to 2016, the majority of these abusive "merger objection" suits were filed in Delaware pursuant to the "internal affairs doctrine." Over time, Delaware courts expressed increasing skepticism of "merger objection" cases generally and "disclosure-only" settlements in particular. *See Assad v. World Energy Sols., Inc.*, No. 10324-CB (Del. Ch. Aug. 20, 2015) ("It just can't be that there are meaningful disclosure violations in every single M&A case that's being filed in this court."); *see also In re Aruba Networks, Inc. Stockholders Litig.*, No. 10765-VCL (Del. Ch. Oct. 9, 2015) ("[W]e have reached a point where we have to acknowledge that settling for disclosure only and giving the type of expansive release that has been given has created a real systemic problem."); *In re Riverbed Tech., Inc. Stockholders Litig.*, No. 10484-VCG (Del Ch. July 27, 2015) ("[A]t least some members of this Court have been thinking in some depth about what the value of disclosure-only settlements is.").

The primary reason for the Delaware courts' skepticism was that the supplemental disclosures in many cases addressed immaterial details that did not aid stockholders in deciding whether to approve a transaction. *See In re Aruba Networks*, No. 10765-VCL; *Assad*, No. 10324-CB; *In re Riverbed Tech.*, No. 10484-VCG; *Acevedo v. Aeroflex Holding Corp.*, No. 7930-VCL. (Del. Ch. July 8, 2015).

In *Trulia*, the Delaware Chancery Court largely eliminated "disclosure-only" settlements in order to reduce frivolous "merger objection" litigation. The *Trulia* court emphasized that:

> [s]cholars have criticized disclosure settlements, arguing that non-material supplemental disclosures provide no benefit to stockholders and amount to little more than deal "rents" or "taxes," while the liability releases that accompany settlements threaten the loss of potentially valuable claims related to the transaction in question or other matters falling within the literal scope of overly broad releases.

129 A.3d at 887. Accordingly, the Chancery Court rejected the parties' "disclosure-only" settlement, finding that the supplemental disclosures that plaintiffs' attorneys obtained for the class were not "material or even helpful." *Id.* The Chancery Court made clear that it would no longer approve disclosure-only settlements except in unusual circumstances. *Id.* at 898 ("Practitioners should expect that disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission.").

C. The Plaintiffs' Bar Shifts to Federal Court.

The *Trulia* decision had an immediate impact on the plaintiffs' bar's tactics in "merger objection" litigation.[4] Since *Trulia*, the plaintiffs' bar has

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[4] The number of challenged mergers dropped from 84% in 2015 to 71% in 2016 and 73% in 2017. *See* 2017 Cornerstone Review, *supra*, at 2.

redirected "merger objection" litigation to federal courts. The post-*Trulia* transfer of "merger objection" litigation to federal courts has been immediate and substantial. In 2014, the federal courts saw 40 "merger objection" filings. *See* NERA, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review* (Jan. 29, 2018) at 5, http://www.nera.com/content/dam/nera/publications/2018/PUB_Year_End_Trends_Report_0118_final.pdf. In 2015, that number rose to 44 "merger objection" filings. *Id.* In 2016, the federal courts saw more "merger objection" filings than the past two years combined, with 90 "merger objection" suits filed. *See id.* That number more than doubled in 2017, reaching 197 "merger objection" suits filed. *See id.* The number of "merger objection" filings in federal courts in 2016 and 2017 is more than the number of filings in the years 2011 through 2015 combined. *See id.*

This increase in federal filings corresponds to a decrease in "merger objection" lawsuits filed in Delaware. Pre-*Trulia*, when suing a company incorporated in Delaware, stockholders filed 60% of suits in Delaware. *See* NERA, "Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review" (Jan. 23, 2017) (citing Matthew D. Cain and Steven Davidoff Solomon, *Takeover Litigation in 2015*, Berkeley Cent. for L. Bus. Econ. (Jan. 14, 2016), https://ssrn.com/abstract=2715890. That number dropped to 23% in 2016 and to just 6% in 2017. *See* 2017 Cornerstone Review, *supra*, at 5.

Experts project that this trend will continue. 109 of the 217 securities class action filings in the first half of 2018 were "merger objection" cases, indicating a projected total of 218 "merger objection" cases this

year, another 10% increase over 2017. *See* NERA, *Recent Trends in Securities Class Action Litigation: H1 2018 Update* (July 18, 2018), http://www.nera.com/content/dam/nera/publications/2018/Recent_SCA_Trends_2018_1H.pdf.

The plaintiffs' bar has turned to federal courts in the hope that those courts would be willing to approve the type of disclosure-only settlements rejected in *Trulia*. *See Rosenfeld v. Time Inc.*, No. 17CV9886 (DLC), 2018 WL 4177938, at *2 (S.D.N.Y. Aug. 30, 2018) ("Post-*Trulia*, plaintiffs have begun bringing M&A lawsuits in other courts, particularly federal courts."). Plaintiffs have had mixed results, with some courts following *Trulia* and others willing to approve the disclosure-only settlements. *Compare In re Walgreen Co. Stockholder Litig.*, 832 F.3d at 724-26 (adopting the rationale of *Trulia*), *with In re Hatteras Fin., Inc., S'holder Litig.*, 286 F. Supp. 3d 727, 730-31 (M.D.N.C. 2017) (approving settlement despite finding that supplemental disclosures were immaterial).

* * *

The Court should grant the Petition because the Ninth Circuit's holding that § 14(e) claims require only a negligently omitted disclosure will burden the federal court system with an increasing number of frivolous "merger objection" cases that the plaintiffs-side class action bar continues to file.

II. THE NINTH CIRCUIT'S DECISION ENCOURAGES FORUM-SHOPPING AND RISKS CREATING A DE FACTO NATIONWIDE NEGLIGENCE STANDARD.

The Ninth Circuit's adoption of a negligence standard for claims under § 14(e) of the Exchange Act will encourage stockholder plaintiffs to continue

filing frivolous "merger objection" cases in district courts within the Ninth Circuit to circumvent *Trulia* and capitalize on the Ninth Circuit's lenient negligence standard. This, coupled with the Exchange Act's liberal jurisdiction provision,[5] encourages forum-shopping, and risks creating a de facto negligence standard for all § 14(e) cases – factors that call for an order granting the Petition.

The Ninth Circuit already attracts a disproportionate number of "merger objection" filings. Although 50% of all U.S. corporations and over 67% of all Fortune 500 companies are incorporated in Delaware,[6] in 2017, only 25% of all federal-court challenges to M&A deals were filed in the Third Circuit. *See* Cornerstone Research, *Securities Class Action Filings: 2018 Midyear Assessment* (2018) at 10, https://www.cornerstone.com/Publications/Reports/Securities-Securities-Class-Action-Filings—2018-Midyear-Assessment. This mismatch reflects a distinct pivot to courts in the Ninth Circuit. In the three-year period from 2012 through 2014, only two "merger objection" suits were filed annually in district courts in that circuit; only eight cases were filed there in 2015. *Id.* However, in 2016, 25 such cases were filed in district courts in the Ninth Circuit, a figure which increased to 41 cases in 2017. *Id.* 22 cases have been filed in the Ninth

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[5] Section 27 of the Exchange Act provides that venue is proper anywhere, among other places, that the "defendant is found or is an inhabitant or transacts business." 15 U.S.C. § 78aa(a).

[6] *Annual Report Statistics*, Del. Division of Corps., https://corp.delaware.gov/stats/ (last visited Nov. 13, 2018).

Circuit in the first half of 2018 alone. *Id.* The Ninth Circuit's decision embracing a negligence standard in § 14(e) cases will exacerbate this trend.

The transition of new case filings to the Ninth Circuit raises an obvious concern about the inconsistent application of § 14(e) in federal courts across the country (and in particular among the main forums for "merger objection" cases) and the potential for forum shopping. Moreover, this development risks creating an undue burden on the resources of Ninth Circuit courts.

In addition, the shifting of cases to the Ninth Circuit means its decision below will, as a practical matter, set a standard not just for corporations headquartered or incorporated within the Ninth Circuit, but for the vast majority of corporations that do any business or conduct tender offers anywhere in the Ninth Circuit.

III. THE NINTH CIRCUIT'S DECISION CREATES UNCERTAINTY AND RISK WITH RESPECT TO TENDER OFFER DISCLOSURE REQUIREMENTS.

In addition to inviting more "merger objection" cases into federal courts, the Ninth Circuit's adoption of a negligence standard also threatens to change the type and volume of disclosures corporations make in connection with tender offers. The Exchange Act was intended to increase disclosure from companies to investors, "arming investors with information" in order to improve market efficiency, curb corporate abuse, limit insider trading, and reduce the need for government intervention. Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 Wash. U. L.Q. 417, 418 (2003); *see also Ernst & Ernst v.*

Hochfelder, 425 U.S. 185, 195 (1976); Thomas L. Hazen, *Treatise on the Law of Securities Regulation* § 1:16 (7th ed. 2017). Section 14(e), enacted in 1968 as part of the Williams Act (amending the Exchange Act), serves this goal as well. *See* Pub. L. No. 90-439, 82 Stat. 455; *see also Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 11 (1985) ("Nowhere in the legislative history is there the slightest suggestion that § 14(e) serves any purpose other than disclosure . . . .").

The Exchange Act and the Williams Act amendments, of course, do not require disclosure to shareholders of every fact. Rather, the statute and this Court have required disclosure of only material information. *See TSC Indus., Inc., v. Northway, Inc.*, 426 U.S. 438, 448 (1976). In the tender offer context, federal courts find "a misstatement or omission [to be] 'material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding' whether to accept the tender offer." *Seaboard World Airlines v. Tiger Int'l, Inc.*, 600 F.2d 355, 361 (2d Cir. 1979) (quoting *Prudent Real Estate Tr. v. Johncamp Realty, Inc.*, 599 F.2d 1140, 1146 (2d Cir. 1979) (Friendly, J.)) (additional quotation marks omitted); *accord In re Digital Island Sec. Litig.*, 357 F.3d at 328. This is essentially the same standard that this Court announced in *TSC Industries*, and which federal courts apply to § 10(b) cases. *TSC Indus.*, 426 U.S. at 448.

In recent years, however, attempts to comply with these disclosure requirements in the context of an aggressive litigation environment have created a risk of "over-disclosure," as management teams are incentivized to "bury shareholders in an avalanche of

trivial information,"[7] in order to minimize risk and "avoid liability." *In re Goodyear Tire & Rubber Co. Sec. Litig.*, No. CIV. A. 88-8633, 1993 WL 130381, at *6 (E.D. Pa. Apr. 22, 1993), *aff'd*, 16 F.3d 403 (3d Cir. 1993). This practice of over-disclosure is not "conducive to informed decision-making." *TSC Indus.*, 426 U.S. at 448-49. Over-disclosure causes companies to waste resources by disclosing immaterial information, and then investors waste their time, money, and effort attempting to distill the material from the immaterial in disclosure documents that are often hundreds of pages long. *See* Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 Ala. L. Rev. 473, 507 (2007).

The Ninth Circuit's decision in this case perversely encourages such over-disclosure. Instead of making judgments to ensure that no material misstatements or omissions appear in the documents, companies will have every reason to attempt to avoid liability under the Ninth Circuit's negligence standard by erring in favor over-inclusive disclosures. The decision below thus threatens to upset the balance struck by this Court's jurisprudence, which seeks to ensure that shareholders obtain material information without becoming drowned in a sea of mundane, immaterial details.

This Court has recognized the danger of over-disclosure. *See TSC Indus.*, 426 U.S. at 448 ("Some information is of such dubious significance that insistence on its disclosure may accomplish more

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[7] *TSC Indus.*, 426 U.S. at 448.

harm than good.").[8] Here, the Ninth Circuit tipped the materiality bar too far in one direction – the wrong direction – and invited management to make voluminous tender offer documents even longer, without providing any additional material information to shareholders. Because the Ninth Circuit's negligence standard will become a nationwide one in practice,[9] the issue of over-disclosure is likely to affect all future tender offers unless the decision below is reversed.

IV. THE NINTH CIRCUIT'S DECISION CREATES ADDITIONAL RISKS FOR FINANCIAL INSTITUTIONS PARTICIPATING IN MERGER TRANSACTIONS.

The Ninth Circuit's ruling adversely affects financial institutions participating in merger activity. Financial institutions are often involved in merger activity as advisors. In most mergers, the seller obtains a "fairness opinion" from a financial advisor, which provides the financial advisor's view

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[8] Delaware courts, too, have cautioned against over-disclosure. *See In re Micromet Inc. S'holders Litig.*, C.A. No. 7197-VCP, 2012 WL 681785, at *11 (Del. Ch. Feb. 29, 2012) ("The duty to disclose is not a mandate for prolixity. Instead, balanced against the requirement of complete disclosure is the pragmatic consideration that creating a lenient standard for materiality poses the risk that the corporation will bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to informed decision-making.") (internal citations, quotation marks, and alterations omitted); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994) ("Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information.").

[9] *See* Section II, *supra*.

on whether the price terms of the merger – usually the per share price to be received by the seller's shareholders – are fair.

As the facts of this case illustrate, shareholders often challenge the financial advisor's analyses and/or conflicts. *See* App. at 4a-5a. Respondent Varjabedian challenged, among other things, the Recommendation Statement's failure to summarize Goldman Sachs' Premium Analysis conducted in connection with the Avago-Emulex merger. App. 5a-6a.

Under Delaware law, a seller must disclose only a "fair summary" of the opinion. *See, e.g.*, *Dent v. Ramtron Int'l Corp.*, C.A. No. 7950-VCP, 2014 WL 2931180, at *12 (Del. Ch. 2014). Stockholder plaintiffs, however, routinely bring "merger objection" cases premised on the notion that merger parties failed to disclose every conceivable detail regarding the financial advisor's fairness opinion. Although Delaware courts have long rejected these claims as a matter of state law,[10] the Ninth Circuit's opinion authorizing negligence-based § 14(e) claims gives plaintiffs the potential opportunity to do what

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[10] *See, e.g.*, *Dent*, 2014 WL 2931180, at *13 ("This is simply a 'tell me more' request that, unlike a viable disclosure claim, fails to identify how the analysis is misleading or incomplete if it does not disclose specifically which publicly available sources of information Needham used to do its work."); *In re 3Com S'holders Litig.*, Civil Action No. 5067-CC, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009) ("There are limitless opportunities for disagreement . . . . Considering this reality, quibbles with a financial advisor's work simply cannot be the basis of a disclosure claim.").

Delaware has prohibited – nitpick the details and assumptions underlying financial analyses.

Moreover, the lower standard may entice stockholder plaintiffs to allege § 14(e) claims directly against financial advisors. Plaintiffs sometimes allege aiding and abetting claims against a financial advisor, but such claims often fail (or are not made) because they require scienter. *See, e.g.*, *In re Zale Corp. Stockholders Litig.*, C.A. No. 9388-VCP, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015) (dismissing aiding and abetting claim against financial advisor Merrill Lynch); *Malpiede v. Townson*, 780 A.2d 1075, 1098 (Del. Ch. 2001) ("[P]laintiffs' aiding and abetting claim fails as a matter of law because the allegations in the complaint do not support an inference that [defendant] knowingly participated . . . ."); *Lee v. Pincus*, C.A. No. 8458-CB, 2014 WL 6066108, at *13 (Del. Ch. Nov. 14, 2014) ("To demonstrate the 'knowing participation' element of an aiding and abetting claim, it must be reasonably conceivable from the well-pled allegations that 'the third party act[ed] with . . . knowledge . . . .' Knowing participation has been described as a 'stringent' standard that 'turn[s] on proof of scienter.'") (alterations in original; internal citations omitted).

Now, however, the Ninth Circuit may have effectively opened the door to claims that would have failed under Delaware law, as plaintiffs need only allege negligence, not scienter, to assert § 14(e) claims directly against financial advisors.[11] If more

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[11] This Court has long rejected aiding and abetting claims for violations of the securities laws. *See Stoneridge Inv. Partners,*

financial advisors are named as defendants in "merger objection" litigation, there is an increased risk of disruption in the proper and efficient operation of the capital markets. This is another reason why it is important for this Court to resolve the circuit split as to the state of mind required for a § 14(e) claim.[12]

V. THE NINTH CIRCUIT ERRED IN ADOPTING A NEGLIGENCE STANDARD.

In adopting a negligence standard for § 14(e), the Ninth Circuit expressly acknowledged that it was breaking with the past decisions by the Second, Third, Fifth, Sixth, and Eleventh Circuits, all of which require scienter as an element of a § 14(e) claim.[13] The Ninth Circuit was wrong to reject the reasoning of those Circuits for several reasons.

LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 158 (2008) (holding the reforms of the PSLRA do not permit private aiding and abetting claims under § 10(b)); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 183 (1994) (holding that private plaintiffs cannot maintain aiding and abetting claims under § 10(b)).

[12] While this Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), requires that a defendant be the "maker" of a statement in order to be the target of a federal securities claim, at least one court – the United States District Court for the Northern District of California – has found that alleged misrepresentations in a recommendation statement that relate to a fairness opinion are attributable to the financial advisor. *See Biotechnology Value Fund, L.P. v. Celera Corp.*, No. C 13-03248 WHA, 2014 WL 988913, at *3-4 (N.D. Cal. Mar. 10, 2014).

[13] *See Ginsburg*, 362 F.3d at 1297-98; *In re Digital Island Sec. Litig.*, 357 F.3d at 328; *Adams*, 623 F.2d at 428-29, 431;

First, the circuits adopting a scienter standard have correctly emphasized the similarities between § 10(b), which requires scienter, and § 14(e).[14] This Court has likewise recognized that similarity, explaining that § 10(b) and § 14(e) are both anti-fraud statutes designed to prevent knowing violations of the securities laws. *See Schreiber*, 472 U.S. at 10-11.

Second, the Ninth Circuit ignored the significance of Congress's decision to leave § 14(e) untouched when enacting the PSLRA in 1995 and SLUSA in 1998. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 409 n.66 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Congress did not revise § 14(e) on either occasion, even knowing that three of the five circuits adopting a scienter standard did so prior to 1995. *See Adams*, 623 F.2d at 428; *Smallwood*, 489 F.2d at 605; *Chris-Craft Indus.*, 480 F.2d at 362.

Third, the Ninth Circuit's textual analysis of § 14(e) is flawed. In the opinion below, the Ninth Circuit divided Section 14(e) into two parts:

> "It shall be unlawful for any person [1] to make any untrue statement of a material

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Smallwood, 489 F.2d at 596, 605; *Chris-Craft Indus., Inc.*, 480 F.2d at 362.

[14] *See Ginsburg*, 362 F.3d at 1298; *In re Digital Island Sec. Litig.*, 357 F.3d at 328; *Adams*, 623 F.2d at 432; *Smallwood*, 489 F.2d at 596; *Chris-Craft Indus., Inc.*, 480 F.2d at 363-64.

> fact or omit to state any material fact necessary in order to make the statement made, in the light of circumstances under which they are made, not misleading, *or* [2] to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . ."

App. 8a (quoting 15 U.S.C. § 78n(e)) (emphasis and alterations in original). Construing the statute as creating "two different offenses," the Ninth Circuit concluded that "because the text of the first clause of Section 14(e) is devoid of any suggestion that scienter is required, we conclude that the first clause of Section 14(e) requires a showing of only negligence, not scienter." App. 8a, 16a. But this was error, in violation of the principle that courts should not "construe statutory phrases in isolation." *United States v. Morton*, 467 U.S. 822, 828 (1984). Moreover, even if the Ninth Circuit were correct in dividing § 14(e) into two clauses, the first clause is "devoid of any suggestion that" *negligence* is required; it says nothing about the mental state necessary to support a claim for making a material false statement.

Further, § 14(e) does not contain the "significant procedural restrictions" Congress employs when expressly enacting a civil remedy for negligence. *See Ernst & Ernst*, 425 U.S. at 208-09. This is of particular significance as courts disagree on whether § 14(e) provides a private civil right of action, and this Court has not yet settled the issue.

CONCLUSION

In light of the foregoing principles, the Court should grant Petitioner's Petition for a writ of certiorari.

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November 13, 2018

No. 18-459

In the Supreme Court of the United States

EMULEX CORPORATION, ET AL.,
Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX – VOLUME I

(Pages 1 to 234)

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In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (October 11, 2018):

Opinion of the United States Court of Appeals for the Ninth Circuit, *Varjabedian v. Emulex Corp., et al.*, 888 F.3d 399 (9th Cir. 2018) 1a

Order of the United States District Court for the Central District of California Granting Defendants' Motion to Dismiss, *Varjabedian v. Emulex Corp., et al.*, 152 F. Supp. 3d 1226 (C.D. Cal. 2016) 27a

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RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Ninth Circuit
Case No. 16-55088

Date Filed	#	Docket Text
01/19/2016	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 01/26/2016. Transcript ordered by 02/16/2016. Transcript due 05/16/2016. Appellant Gary Varjabedian opening brief due 06/27/2016. Appellees Avago Technologies Wireless (USA) Manufacturing, Inc., Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Bruce C. Edwards, Emerald Merger Sub, Inc., Emulex Corporation, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari and Dean A. Yoost answering brief due 07/27/2016. Appellant's optional reply brief is due 14 days after service of the answering brief. [9830361] (FB) [Entered: 01/19/2016 09:40 AM]
		* * *
06/27/2016	25	Filed clerk order: The opening brief [23] submitted by Gary

Date Filed	#	Docket Text
		Varjabedian is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed the excerpts of record [24] submitted by Gary Varjabedian. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10030405] (GV) [Entered: 06/27/2016 02:15 PM]
		* * *
08/18/2016	32	Filed clerk order: The answering brief [30] submitted by Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Bruce C. Edwards, Emulex Corporation, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari and Dean A. Yoost is filed.

Date Filed	#	Docket Text
		Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10092354] (GV) [Entered: 08/18/2016 03:05 PM]
08/18/2016	33	Filed (ECF) Appellees Avago Technologies Wireless (USA) Manufacturing, Inc. and Emerald Merger Sub, Inc. Motion to file a late brief. Date of service: 08/18/2016. [10092781] [16-55088] (Mattis, Hilary) [Entered: 08/18/2016 05:25 PM]
		* * *
08/22/2016	36	Filed clerk order (Deputy Clerk: AMT): The motion of appellees Avago Technologies Wireless (USA) Manufacturing, Inc. and Emerald Merger Sub, Inc. (docket entry #[33]) to accept late-filed and joinder brief is granted. The clerk

Date Filed	#	Docket Text
		will file the answering brief (docket entry #[30]) submitted by appellees Avago Technologies Wireless (USA) Manufacturing, Inc. and Emerald Merger Sub, Inc. The optional reply brief is due within 14 days after the date of this order. [10095425] (IV) [Entered: 08/22/2016 01:31 PM]
08/22/2016	37	Filed clerk order: The answering brief [31] submitted by Avago Technologies Wireless (USA) Manufacturing, Inc. and Emerald Merger Sub, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10095559] (GV) [Entered: 08/22/2016 02:11 PM]
		* * *
10/05/2016	45	Filed clerk order: The reply brief [44] submitted by Gary

Date Filed	#	Docket Text
		Varjabedian is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10149840] (GV) [Entered: 10/05/2016 12:39 PM]
		* * *
09/21/2017	59	Filed (ECF) Appellees Emulex Corporation, Bruce C. Edwards, Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari and Dean A. Yoost citation of supplemental authorities. Date of service: 09/21/2017. [10589943] [16-55088] (Landau, Eric) [Entered: 09/21/2017 04:39 PM]
10/05/2017	60	ARGUED AND SUBMITTED TO SUSAN P. GRABER, MARY H. MURGUIA and MORGAN B.

Date Filed	#	Docket Text
		CHRISTEN. [10607129] (BG) [Entered: 10/05/2017 10:19 AM]
		* * *
04/20/2018	62	FILED OPINION (SUSAN P. GRABER, MARY H. MURGUIA and MORGAN B. CHRISTEN)AFFIRMED in part, REVERSED in part, and REMANDED. The parties shall bear their own costs on appeal. Judge: MHM Authoring, Judge: MBC Concurring. FILED AND ENTERED JUDGMENT. [10843936] (RMM) [Entered: 04/20/2018 07:10 AM]
05/04/2018	63	Filed (ECF) Appellees Emulex Corporation, Bruce C. Edwards, Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari and Dean A. Yoost petition for rehearing en banc (from 04/20/2018 opinion). Date of service: 05/04/2018. [10862517] [16-55088] (Landau, Eric) [Entered: 05/04/2018 03:19 PM]
05/04/2018	64	Filed (ECF) Appellees Avago Technologies Wireless (USA) Manufacturing, Inc. and Emerald Merger Sub, Inc. petition for

Date Filed	#	Docket Text
		rehearing en banc (from 04/20/2018 opinion). Date of service: 05/04/2018. [10862587] [16-55088] (Rawlinson, Matthew) [Entered: 05/04/2018 03:41 PM]
05/25/2018	65	Filed order (SUSAN P. GRABER, MARY H. MURGUIA and MORGAN B. CHRISTEN) Plaintiff-Appellant is directed to file a response to Defendants-Appellees' Petition for Rehearing En Banc filed on May 4, 2018. The response shall not exceed 15 pages and shall be filed within 21 days of the date of this order. [10886500] (OC) [Entered: 05/25/2018 02:56 PM]
		* * *
07/13/208	74	Filed (ECF) Appellant Gary Varjabedian response to Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing) for rehearing by en banc only (all active, any interested senior judges), Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing) for rehearing by en banc only (all active, any interested senior judges). Date of service: 07/13/2018. [10940983].

Date Filed	#	Docket Text
		[16-55088] (Geyser, Daniel) [Entered: 07/13/2018 08:12 AM]
09/06/2018	75	Filed order (SUSAN P. GRABER, MARY H. MURGUIA and MORGAN B. CHRISTEN) The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED (Docs. [63], [64]). [11002583] (WL) [Entered: 09/06/2018 09:01 AM]
09/13/2018	76	Filed (ECF) Appellees Emulex Corporation, Bruce C. Edwards, Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari and Dean A. Yoost Motion to stay the mandate. Date of service: 09/13/2018. [11011003] [16-55088] (Landau, Eric) [Entered: 09/13/2018 02:54 PM]

Date Filed	#	Docket Text
09/14/2018	77	Filed order (SUSAN P. GRABER, MARY H. MURGUIA and MORGAN B. CHRISTEN) Appellees' motion for stay of mandate pending filing of petition for writ of certiorari is GRANTED (Doc. [76]). Fed. R. App. P. 41 (b). The mandate is stayed for ninety (90) days pending the Appellees= filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, the stay shall continue until final disposition by the Supreme Court. [11012618] (OC) [Entered: 09/14/2018 03:34 PM]
10/12/2018	78	**Supreme Court Case Info** Case number: 18-459 Filed on: 10/11/2018 Cert Petition Action 1: Pending [11045154] (HH) [Entered: 10/12/2018 12:48 PM]

RELEVANT DOCKET ENTRIES

U.S. District Court
for the Central District of California
(Southern Division - Santa Ana)
Case No. 8:15-cv-00554-CJC-JCG

Date Filed	#	Docket Text
04/08/2015	1	COMPLAINT Receipt No: 0973-15514487 - Fee: $400, filed by Plaintiff Gary Varjabedian. (Attorney David E Bower added to party Gary Varjabedian(pty:pla)) (Bower, David) (Entered: 04/08/2015)
		* * *
04/08/2015	3	*Plaintiff's* NOTICE of Interested Parties filed by Plaintiff Gary Varjabedian, identifying Gary Varjabedian, EMULEX CORPORATION, BRUCE C. EDWARDS, JEFFREY W. BENCK, GREGORY S. CLARK, GARY J. DAICHENDT, PAUL F. FOLINO, BEATRIZ V. INFANTE, JOHN A. KELLEY, RAHUL N. MERCHANT, NERSI NAZARI, DEAN A. YOOST, AVAGO TECHNOLOGIES WIRELESS (U.S.A.) MANUFACTURING, INC., and EMERALD MERGER

Date Filed	#	Docket Text
		SUB, INC.. (Bower, David) (Entered: 04/08/2015)
		* * *
06/30/2015	21	Amendment to NOTICE OF MOTION AND MOTION for Appointment of Counsel *(Lead) and Appointment of Lead Plaintiff* 18 *Selected Hearing Date* filed by Movant Jerry Mutza. (Bower, David) (Entered: 06/30/2015)
07/28/2015	22	ORDER by Judge Cormac J. Carney: Granting MOTION for Appointment as Lead Plaintiff and Approval of Lead Counsel 18 . Mr. Mutzas motion for appointment as lead plaintiff and approval of Faruqi & Faruqi, LLP as lead counsel for this putative class action is GRANTED. (jtil) (Entered: 07/28/2015)
		* * *
09/11/2015	25	Joint STIPULATION for Protective Order filed by Defendants Jeffrey W Benck, Gregory S Clark, Gary J Daichendt, Bruce C Edwards, Emulex Corporation, Paul F Folino, Beatriz V Infante, John A Kelley, Rahul N Merchant, Nersi Nazari, Dean A Yoost.

Date Filed	#	Docket Text
		(Attachments: # 1 Proposed Order [Proposed] Stipulated Protective Order)(Biffar, Travis) (Entered: 09/11/2015)
09/15/2015	27	STIPULATED PROTECTIVE ORDER RE CONFIDENTIALITY by Magistrate Judge Jay C. Gandhi re Stipulation for Protective Order 25 . (kh) (Entered: 09/16/2015)
09/17/2015	29	FIRST AMENDED COMPLAINT against DEFENDANTS Avago Technologies Wireless USA Manufacturing Inc, Jeffrey W Benck, Gregory S Clark, Gary J Daichendt, Bruce C Edwards, Emerald Merger Sub Inc, Emulex Corporation, Paul F Folino, Beatriz V Infante, John A Kelley, Rahul N Merchant, Nersi Nazari, Dean A Yoost amending Complaint (Attorney Civil Case Opening) 1 , filed by Plaintiff Jerry Mutza (Attachments: # 1 Exhibit A)(Bower, David) (Entered: 09/17/2015)
10/13/2015	30	NOTICE OF MOTION AND MOTION to Dismiss Amended Complaint filed by Certain Defendants' Jeffrey W Benck, Gregory S Clark, Gary J

Date Filed	#	Docket Text
		Daichendt, Bruce C Edwards, Emulex Corporation, Paul F Folino, Beatriz V Infante, John A Kelley, Rahul N Merchant, Nersi Nazari, Dean A Yoost. Motion set for hearing on 12/21/2015 at 01:30 PM before Judge Cormac J. Carney. (Attachments: # 1 Memorandum of Points and Authorities In Support of Motion to Dismiss, # 2 Request for Judicial Notice In Support of Motion to Dismiss) (Landau, Eric) (Entered: 10/13/2015)
10/13/2015	31	DECLARATION of Travis Biffar In Support Of NOTICE OF MOTION AND MOTION to Dismiss Amended Complaint 30 filed by Defendants Jeffrey W Benck, Gregory S Clark, Gary J Daichendt, Bruce C Edwards, Emulex Corporation, Paul F Folino, Beatriz V Infante, John A Kelley, Rahul N Merchant, Nersi Nazari, Dean A Yoost. (Attachments: # 1 Exhibit A to Declaration of Travis Biffar)(Biffar, Travis) (Entered: 10/13/2015)
10/13/2015	32	JOINDER in NOTICE OF MOTION AND MOTION to Dismiss Amended Complaint 30

Date Filed	#	Docket Text
		filed by Defendants Avago Technologies Wireless USA Manufacturing Inc, Emerald Merger Sub Inc. (Gibbs, Patrick) (Entered: 10/13/2015)
		* * *
11/13/2015	38	PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION TO DISMISS re: NOTICE OF MOTION AND MOTION to Dismiss Amended Complaint 30 filed by Movant Jerry Mutza, Plaintiff Gary Varjabedian. (Attachments: # 1 Declaration, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Request, # 9 Proposed Order PDF)(Bower, David) (Entered: 11/13/2015)
12/04/2015	39	REPLY in support of NOTICE OF MOTION AND MOTION to Dismiss Amended Complaint 30 filed by Defendants Jeffrey W Benck, Gregory S Clark, Gary J Daichendt, Bruce C Edwards, Emulex Corporation, Paul F Folino, Beatriz V Infante, John A Kelley, Rahul N Merchant, Nersi Nazari, Dean A Yoost. (Landau, Eric) (Entered: 12/04/2015)

Date Filed	#	Docket Text
12/04/2015	40	OBJECTIONS AND RESPONSE IN OPPOSITION TO PLAINTIFF'S REQUEST FOR JUDICAL NOTICE re NOTICE OF MOTION AND MOTION to Dismiss Amended Complaint 30 filed by Defendants Jeffrey W Benck, Gregory S Clark, Gary J Daichendt, Bruce C Edwards, Emulex Corporation, Paul F Folino, Beatriz V Infante, John A Kelley, Rahul N Merchant, Nersi Nazari, Dean A Yoost. (Landau, Eric) (Entered: 12/04/2015)
12/04/2015	41	JOINDER in NOTICE OF MOTION AND MOTION to Dismiss Amended Complaint 30 *DEFENDANTS AVAGO TECHNOLOGIES WIRELESS (U.S.A.) MANUFACTURING, INC. AND EMERALD MERGER SUB, INC.S NOTICE OF JOINDER AND JOINDER IN REPLY TO CERTAIN DEFENDANTS MOTION TO DISMISS* filed by Defendants Avago Technologies Wireless USA Manufacturing Inc, Emerald Merger Sub Inc. (Mattis, Hilary) (Entered: 12/04/2015)

* * *

Date Filed	#	Docket Text
01/11/2016	49	MINUTES OF Hearing on Defendants Motion to Dismiss 30 held before Judge Cormac J. Carney: Motion hearing held. The Court hears oral argument from the parties. The Court takes the Motion under submission. Order to issue. Court Reporter: Debbie Hino-Spaan; Attorney for Plaintiff: David Bower, Juan Monteverde, Miles Schreiner; Attorney for Defendant: Eric Landau, Travis Biffar, Hilary Mattis. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. TEXT ONLY ENTRY. (mku) (Entered: 01/11/2016)
		* * *
01/13/2016	52	ORDER Granting Defendants' Motion to Dismiss 30 by Judge Cormac J. Carney: For the foregoing reasons, Defendants' motion is GRANTED and Plaintiff's claims are DISMISSED WITH PREJUDICE. See document for further information. (MD JS-6. Case Terminated) (lwag) (Entered: 01/13/2016)
		* * *

Date Filed	#	Docket Text
01/15/2016	54	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Plaintiff Gary Varjabedian. Appeal of Order on Motion to Dismiss, 52 . (Appeal Fee - $505 Fee Paid, Receipt No. 0973-17115029.) (Bower, David) (Entered: 01/15/2016)
01/19/2016	55	NOTIFICATION by Circuit Court of Appellate Docket Number 16-55088, 9th Circuit regarding Notice of Appeal to 9th Circuit Court of Appeals 54 as to Plaintiff Gary Varjabedian. (mat) (Entered: 01/20/2016)
02/24/2016	57	TRANSCRIPT for proceedings held on 1/11/2016 at 2:04 p.m. ****Transcript may be viewed at the court public terminal or purchased through Court Reporter DEBBIE HINO-SPAAN at: WEBSITE www.debbiehinospaan.com; E-mail, dhinospaan@yahoo.com before the deadline for Release of Transcript restriction. After that date, it may be obtained from the Court Reporter or through PACER. Additional formats of the transcript (ASCII, Condensed, and Word Indexing/Concordance) are also available to be purchased at

Date Filed	#	Docket Text
		any time through the Court Reporter. Notice of Intent to Redact due within 7 days of this date.** Redaction Request due 3/16/2016. Redacted Transcript Deadline set for 3/28/2016. Release of Transcript Restriction set for 5/24/2016. (dhs) (Main Document 57 replaced on 3/1/2016) (rrp). (Entered: 02/24/2016)
		* * *
04/20/2016	60	OPINION from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 54 filed by Gary Varjabedian. CCA # 16-55088. We REVERSE the district courts decision as to the Section 14 (e) claim because the district court employed a scienter standard in analyzing the Section 14(e)claim. We also REMAND for the district court to reconsider Defendants motion to dismiss under a negligence standard. AFFIRMED in part, REVERSED in part, andREMANDED. The parties shall bear their own costs onappeal. (shb) (Entered: 04/20/2018)

Date Filed	#	Docket Text
04/20/2018	61	OPINION from Ninth Circuit Court of Appeals filed. Re CCA # 16-55088. (yl) (Entered: 04/20/2018)
		* * *
06/04/2018	64	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 54 filed by Gary Varjabedian. CCA # 16-55088. Appellant's unopposed motion for an extension of time to file a response to Appellees' Petition for Rehearing En Banc is GRANTED. The response is now due on July 13, 2018. (lom) (Entered: 06/04/2018)
09/14/2018	65	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 54 filed by Gary Varjabedian. CCA # 16-55088. Appellees' motion for stay of mandate pending filing of petition for writ of certiorari is GRANTED (Doc. 76). Fed. R. App. P. 41 (b). The mandate is stayed for ninety (90) days pending the Appellees' filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, the stay

Date Filed	#	Docket Text
		shall continue until final disposition by the Supreme Court. (mat) (Entered: 09/18/2018)

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SCHEDULE 14D-9
(RULE 14d-101)

Solicitation/Recommendation Statement Under Section 14(d)(4) of the Securities Exchange Act of 1934

EMULEX CORPORATION
(Name of Subject Company)

EMULEX CORPORATION
(Name of Person Filing Statement)

Common Stock, $0.10 par value per share
(Title of Class of Securities)

292475209
(CUSIP Number of Class of Securities)

Jeffrey W. Benck
President and Chief Executive Officer
Emulex Corporation
3333 Susan Street
Costa Mesa, California 92626
(714) 662-5600
(Name, address and telephone number of person authorized to receive notices and communications on behalf of the persons filing statement)

With copies to:

Marilyn W. Sonnie **Acting General Counsel** **Emulex Corporation** **3333 Susan Street** **Costa Mesa, California 92626** **(714) 662-5600**	**Robert A. Profusek** **Jones Day** **222 East 41st Street** **New York, New York 10017** **(212) 326-3800**

☐ Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer

* * *

Item 1. Subject Company Information

Name and Address

The name of the subject company to which this Solicitation/Recommendation Statement on Schedule 14D-9 (this "**Statement**") relates is Emulex Corporation, a Delaware corporation ("**Emulex**"). The address of Emulex's principal executive office is 3333 Susan Street, Costa Mesa, California 92626 and its telephone number is (714) 662-5600.

Securities

The title of the class of equity securities to which this Statement relates is Emulex's common stock, par value of $0.10 per share (the "**Shares**"). As of the close of business on April 3, 2015, the most recent practicable date, there were (i) 240,000,000 Shares authorized and 72,444,645 Shares issued and outstanding (excluding 22,633,339 Shares held in

treasury), (ii) 1,888,262 Shares subject to outstanding employee options to purchase Shares, (iii) 2,790,832 Shares subject to outstanding restricted stock unit awards that are not settled in cash, (iv) 1,422,597 Shares subject to other outstanding Emulex stock awards, consisting of 200,843 Shares subject to performance stock unit awards that are not settled in cash, 1,117,144 Shares subject to cash settled restricted stock unit awards and 104,610 Shares subject to performance cash settled unit awards, (v) 444,000 Shares reserved for issuance pursuant to Emulex's employee stock purchase plan, and (vi) 22,224,320 Shares subject to issuance upon the conversion of Emulex's 1.75% Convertible Senior Notes due 2018 (the "**Notes**") (including the estimated effect of any make-whole fundamental change provision based upon a conversion rate of 126.9961 Shares per $1,000 principal amount of Notes and assuming for purposes of this calculation that (A) the Effective Date (as defined below) is May 5, 2015 and (B) conversions are settled in full in Shares).

Item 2. Identity and Background of Filing Person

Name and Address

The name, business address and telephone number of Emulex, which is both the person filing this Statement and the subject company, are set forth in Item 1—"Subject Company Information—Name and Address."

Tender Offer and Merger

This Statement relates to the offer (the "**Offer**") by Emerald Merger Sub, Inc., a Delaware corporation ("**Purchaser**") and a wholly owned subsidiary of

Avago Technologies Wireless (U.S.A.) Manufacturing Inc., a Delaware corporation ("**Avago**") and an indirect wholly owned subsidiary of Avago Technologies Limited, a limited company organized under the laws of the Republic of Singapore ("**Avago's Parent**"), to purchase all of Emulex's outstanding Shares for $8.00 in cash per Share (such price or any different price per Share that may be paid pursuant to the Offer in accordance with the Merger Agreement (as defined below), the "**Offer Price**), without interest, subject to any withholding of taxes required by applicable law, on the terms and subject to the conditions set forth in the Offer to Purchase, dated April 7, 2015 (as amended or supplemented from time to time, the "**Offer to Purchase**") and in the related Letter of Transmittal (as amended or supplemented from time to time, the "**Letter of Transmittal**"). The Offer is described in a Tender Offer Statement on Schedule TO (as amended or supplemented from time to time, the "**Schedule TO**"), which was filed by Purchaser, Avago and Avago's Parent with the Securities and Exchange Commission (the "**SEC**") on April 7, 2015. The Offer to Purchase and form of Letter of Transmittal are filed as Exhibits (a)(1)(A) and (a)(1)(B) to this Statement, respectively, and are incorporated herein by reference.

The Offer is being made pursuant to an Agreement and Plan of Merger, dated as of February 25, 2015, among Emulex, Avago and Purchaser (as amended or supplemented from time to time, the "**Merger Agreement**"). The Merger Agreement provides, among other things, that after the completion of the Offer, on its terms and subject to the satisfaction or (to the extent permitted by applicable law) waiver of each of the applicable conditions set forth therein,

Purchaser will be merged with and into Emulex (the "**Merger**" and, together with the Offer and the other transactions contemplated by the Merger Agreement, the "**Transaction**"), with Emulex surviving as a wholly owned subsidiary of Avago (the "**Surviving Corporation**").

If, after the consummation of the Offer, Purchaser and any other subsidiary of Avago hold in the aggregate at least 90% of the issued and outstanding Shares, Purchaser and Emulex have agreed to take all necessary and appropriate actions to cause the Merger to become effective as promptly as practicable without a meeting of the holders of Shares (the "**Shareholders**") in accordance with Section 253 of the General Corporation Law of the State of Delaware (the "**DGCL**"). In the event that the Merger cannot be effected pursuant to Section 253 of the DGCL, then, as promptly as practicable following the consummation of the Offer, Purchaser and Emulex have agreed to take all necessary and appropriate actions to cause the Merger to become effective, without a meeting of the Shareholders in accordance with Section 251(h) of the DGCL. At the effective time of the Merger (the "**Effective Time**"), each outstanding Share (other than Shares held in treasury by Emulex, Shares directly or indirectly owned of record by Avago or any of its subsidiaries, including Purchaser, and Shares in respect of which appraisal rights have been perfected in accordance with Section 262 of the DGCL) will be cancelled and converted into the right to receive an amount equal to the Offer Price in cash, without interest, subject to any withholding of taxes required by applicable law. Purchaser does not expect there to be a significant

period of time between the consummation of the Offer and the consummation of the Merger.

The Offer is conditioned on there being validly tendered and not properly withdrawn prior to the expiration of the Offer a number of Shares that, together with Shares then owned, directly or indirectly, by Avago or any of its wholly owned subsidiaries, including Purchaser, or with respect to which Avago or any of its wholly owned subsidiaries, including Purchaser, otherwise has, directly or indirectly, sole voting power, represents a majority of the Shares then outstanding (determined on a fully diluted basis) and no less than a majority of the voting power of the shares of capital stock of Emulex then outstanding (determined on a fully diluted basis) and that would be entitled to vote upon the adoption of the Merger Agreement and approval of the Merger (excluding from the number of tendered Shares, but not the number of outstanding Shares, Shares tendered pursuant to guaranteed delivery procedures that have not yet been delivered in settlement or satisfaction of such guarantee) and satisfaction of other conditions. A copy of the Merger Agreement is filed as Exhibit (e)(1) to this Statement and is incorporated herein by reference. A copy of Section 262 of the DGCL is attached as Annex B to this Statement.

The Offer is scheduled to expire at 12:00 midnight, New York City time on May 5, 2015 (one minute after 11:59 p.m., New York City time, on May 4, 2015), subject to extension in certain circumstances as required or permitted by the Merger Agreement, the SEC or applicable law.

The foregoing summary of the Offer, the Merger and the Merger Agreement is qualified in its entirety

by the description contained in the Offer to Purchase, the Letter of Transmittal and the Merger Agreement.

Avago has formed Purchaser in connection with the Merger Agreement, the Offer and the Merger. The information set forth in the Offer to Purchase under the caption "The Offer—Section 8—Certain Information Concerning Avago, Parent and the Purchaser" states that the address of the principal executive offices of Avago and Purchaser are located at 1320 Ridder Park Drive, San Jose, California 95131.

The information relating to the Offer, including the Offer to Purchase, the Letter of Transmittal and related documents and this Statement, can be obtained without charge from the SEC's website at www.sec.gov.

Item 3. Past Contacts, Transactions, Negotiations and Agreements

Except as set forth in this Statement or as otherwise incorporated herein by reference, as of the date hereof, there are no material agreements, arrangements or understandings or any actual or potential conflicts of interest between Emulex or its affiliates, on the one hand, and (1) any of Emulex's or any such affiliate's directors, executive officers or any of their respective affiliates or (2) Avago, Avago's Parent, Purchaser or any of their respective directors, executive officers or affiliates, on the other hand.

Arrangements with Current Executive Officers and Directors of Emulex

As described below, the consummation of the Offer will constitute a change in control of Emulex for purposes of determining certain entitlements due to certain executive officers of Emulex under severance

and other benefit agreements or arrangements to which Emulex is a party or sponsor. In addition, certain provisions of the Merger Agreement relate to post-closing indemnity and other rights. The Board of Directors of Emulex (the "**Board**") was aware of these matters and considered them, among other matters, in approving the Merger Agreement and the Transaction.

Consideration for Emulex Options

Pursuant to the Merger Agreement, at the Effective Time, each option to purchase Shares (an "**Emulex Option**") with an exercise price per Share that is less than the Offer Price (an "**In-the-Money Emulex Option**") that is outstanding and vested (including any unvested In-the-Money Emulex Options that are not assumed in connection with the Merger) as of immediately prior to the Effective Time (a "**Cashed Out Emulex Option**") will be cancelled immediately prior to the Effective Time and converted into the right to receive an amount in cash equal to the product obtained by multiplying (1) the aggregate number of Shares subject to such Emulex Option immediately prior to the Effective Time and (2) the excess of the Offer Price over the exercise price per share of such Emulex Option (the "**Option Consideration**"). Each In-the-Money Emulex Option that is outstanding and unvested immediately prior to the Effective Time and is held by an employee of Emulex or its subsidiaries who continues to be employed by Avago or its subsidiaries (an "**Emulex Employee**") or is a nonemployee individual service provider of Emulex or any of its subsidiaries who, at the Effective Time, continues his or her service with the Surviving Corporation or any of its subsidiaries,

other than any such service provider who is ineligible to be included on a registration statement filed by Avago's Parent on Form S-8 (an "**Emulex Service Provider**") as of immediately after the Effective Time, will be assumed by Avago's Parent and converted automatically at the Effective Time into an option denominated in whole ordinary shares, no par value, of Avago's Parent ("**Avago Ordinary Shares**") having the same terms and conditions as the In-the-Money Emulex Option (each, an "**Assumed Option**"), except that (1) each such Assumed Option will be exercisable (or will become exercisable in accordance with its terms) for that number of Avago Ordinary Shares equal to the product of (a) the number of Shares that were issuable upon exercise of such Emulex Option immediately prior to the Effective Time, multiplied by (b) a fraction (such ratio, the "**Exchange Ratio**"), the numerator of which is the Offer Price and the denominator of which is the volume weighted average price for an Avago Ordinary Share on the Nasdaq Global Select Market, calculated to four decimal places and determined without regard to after-hours trading or any other trading outside of the regular trading session trading hours, for the five consecutive trading days ending on the third complete trading day prior to (and excluding) the date that the Merger closes (the "**Closing Date**") as reported by Bloomberg, L.P., and rounding such product down to the nearest whole number of Avago Ordinary Shares, (2) the per share exercise price for the Avago Ordinary Shares issuable upon exercise of such Assumed Option will be equal to the quotient determined by dividing (a) the exercise price per Share at which such Emulex Option was exercisable immediately prior to the Effective Time by (b) the Exchange Ratio, and

rounding such quotient up to the nearest whole cent, and (3) all references to "Emulex" in the applicable Company Stock Plans (as defined in the Merger Agreement) and the stock option agreements will be references to Avago's Parent. All Emulex Options that are not In-the-Money Emulex Options will be cancelled as of immediately prior to the Effective Time for no consideration.

As of April 3, 2015, Emulex's executive officers collectively held Emulex Options to purchase 1,187,341 Shares, with exercise prices ranging from $5.05 to $20.56 per Share. Of this amount, Emulex Options to purchase 113,954 Shares issuable upon exercise of such Emulex Options were vested In-the-Money Emulex Options, Emulex Options to purchase 504,387 Shares issuable upon exercise of such Emulex Options were unvested In-the-Money Emulex Options and Emulex Options to purchase 569,000 Shares issuable upon exercise of such Emulex Options were not In-the-Money Emulex Options. As of April 3, 2015, no non-employee directors owned outstanding vested or unvested In-the-Money Emulex Options.

If, at the Effective Time, each outstanding and vested In-the-Money Emulex Option held by Emulex's executive officers as of April 3, 2015 were converted into the right to receive the Option Consideration, Emulex's executive officers would receive an aggregate of approximately $40,576 in cash, without interest, less any required withholding of taxes required by applicable law. In addition, if, at the Effective Time, each outstanding and unvested In-the-Money Emulex Option held by Emulex's executive officers as of April 3, 2015 were assumed by Avago's Parent, such In-the-Money Emulex Options would be automatically converted into the right to receive

approximately 31,989 Avago Ordinary Shares upon exercise (using an Exchange Ratio that assumes that the Closing Date occurred on April 3, 2015).

Consideration for Emulex RSU Awards

Pursuant to the Merger Agreement, at the Effective Time, each restricted stock unit award that is denominated in Shares, vests based on the lapse of time and continued service, is not settled in cash and was granted pursuant to a Company Stock Plan (an "**Emulex RSU Award**") and that is outstanding immediately prior to the Effective Time and is held by a person who is an Emulex Employee or an Emulex Service Provider as of immediately after the Effective Time, will be assumed by Avago's Parent and converted automatically at the Effective Time into a restricted share unit award covering Avago Ordinary Shares having, subject to applicable laws, the same terms and conditions as an Emulex RSU Award (each, an "**Assumed RSU Award**"), except that (1) each such Emulex RSU Award will entitle the holder, upon settlement, to that number of whole Avago Ordinary Shares equal to the product of (a) the number of Shares that were issuable with regard to such Emulex RSU Award immediately prior to the Effective Time, multiplied by (b) the Exchange Ratio, and rounding such product down to the nearest whole number of Avago Ordinary Shares and (2) all references to "Emulex" in the applicable Company Stock Plans and Emulex RSU Award agreements will be references to Avago's Parent. Each Emulex RSU Award that is outstanding immediately prior to the Effective Time and is not an Assumed RSU Award ("**Cashed Out Emulex RSUs**") will vest in full and be cancelled immediately prior to the Effective Time and converted

into the right to receive an amount in cash equal to the product obtained by multiplying (i) the aggregate number of Shares subject to such Emulex RSU Award immediately prior to the Effective Time and (ii) the Offer Price (the "**RSU Consideration**").

As of April 3, 2015, Emulex's current executive officers collectively held Emulex RSU Awards for 416,120 Shares, and no non-employee directors held any Emulex RSU Awards. Accordingly, if the executive officers remain employed by Avago or the Surviving Corporation as of immediately after the Effective Time, such outstanding Emulex RSU Awards will be converted to restricted stock unit awards covering approximately 26,391 Avago Ordinary Shares (using an Exchange Ratio that assumed the Closing Date occurred on April 3, 2015), and the executive officers will not receive any payments in respect of such Emulex RSU Awards. If, at the Effective Time, each Emulex RSU Award held by Emulex's current executive officers as of April 3, 2015 were converted into the right to receive the RSU Consideration, Emulex's executive officers would receive an aggregate of approximately $3,328,960 in cash, without interest, less any withholding of taxes required by applicable law.

Consideration for Emulex Stock Awards

Pursuant to the Merger Agreement, at the Effective Time, any performance stock unit award, performance share award, restricted stock award, cash settled restricted stock unit award, performance cash settled unit award or other equity award denominated in Shares (other than an Emulex Option or Emulex RSU Award) which was granted pursuant to a Company Stock Plan (each, an "**Emulex Stock**

Award") that is outstanding immediately prior to the Effective Time and is held by a person who is an Emulex Employee or Emulex Service Provider as of immediately after the Effective Time will be assumed by Avago's Parent and converted automatically at the Effective Time into a cash-settled award having the same terms and conditions as an Emulex Stock Award (each, an "**Assumed Stock Award**"), except that (1) each such Emulex Stock Award will entitle the holder, upon settlement, to a cash payment equal to the product of (a) the number of Shares that were issuable with regard to such Emulex Stock Award immediately prior to the Effective Time, multiplied by (b) the Offer Price, (2) the performance goal(s) with respect to each such Emulex Stock Award that includes performance criteria will be deemed satisfied at 100% of the target level of achievement (50th percentile of peer companies), and (3) all references to "Emulex" in the applicable Company Stock Plans and Emulex Stock Award agreements will be references to Avago's Parent. Each Emulex Stock Award that is not an Assumed Stock Award (each, a "**Cashed Out Emulex Stock Award**") will vest in full (or, in the case of each performance-based Emulex Stock Award that is not an Assumed Stock Award, at the target level of achievement (50th percentile of peer companies) for such performance-based Emulex Stock Award) and be cancelled immediately prior to the Effective Time and converted into the right to receive an amount in cash equal to the product obtained by multiplying (1) the aggregate number of Shares subject to such Emulex Stock Award immediately prior to the Effective Time and (2) the Offer Price (the "**Stock Award Consideration**").

As of April 3, 2015, Emulex's non-employee directors collectively held 56,250 outstanding Emulex Stock Awards and the current executive officers collectively held 496,428 outstanding Emulex Stock Awards. Accordingly, to the extent the executive officers remain employed by Avago or the Surviving Corporation as of immediately after the Effective Time, such outstanding Emulex Stock Awards will be converted into cash-settled awards aggregating approximately $3,971,424. Pursuant to a letter agreement with Emulex dated February 18, 2015, each of Emulex's non-employee directors agreed to waive any acceleration of such director's outstanding restricted stock awards that would otherwise occur upon the consummation of the Merger, notwithstanding the terms of any equity plan or any agreement or instrument related to such restricted stock awards, if the Effective Time occurs prior to the date on which such awards would otherwise vest in accordance with their terms (six months from the date of grant), and to forfeit the number of restricted Shares awarded on February 18, 2015 had $8.00 been used to calculate the number of restricted Shares awarded rather than $6.39, the closing sales price for Shares on the date of the award. As such, each non-employee director's restricted stock awards, which comprise all of the Emulex Stock Awards held by the non-employee directors, will be forfeited for no consideration upon the resignation of such director on or about the Effective Time if the Effective Time occurs prior to the date on which such awards would otherwise vest in accordance with their terms (six months from the date of grant).

The foregoing summary is qualified in its entirety by reference to the Merger Agreement, which is filed

as Exhibit (e)(1) to this Statement and is incorporated herein by reference, and the Company Stock Plans, which are filed as Exhibits (e)(10) and (e)(11) to this Statement and are incorporated herein by reference.

Summary of Consideration Payable to Directors and Executive Officers

Assuming that the Effective Time occurred on April 3, 2015, the following table sets forth the consideration that each of Emulex's current directors and executive officers would receive if: (1) such director or executive officer were to tender all of the Shares that he or she owns in connection with the Offer; (2) all In-the-Money Emulex Options held by such director or executive officer were converted into the right to receive the Option Consideration at the Effective Time; (3) all Emulex RSU Awards held by such director or executive officer were converted into the right to receive the RSU Consideration at the Effective Time; and (4) all Emulex Stock Awards held by the executive officers were converted into the right to the receive the Stock Award Consideration at the Effective Time, and all Emulex Stock Awards held by the directors were cancelled for no consideration at the Effective Time. In addition, the amounts shown below (i) disregard Emulex Options that have an exercise price equal to or greater than $8.00 and (ii) do not reflect any taxes payable by the executives or directors.

* * *

[Chart and Notes Thereto Omitted from Joint Appendix. Omitted Materials Available at ER79-82.]

Key Employee Retention Agreement with Mr. Benck

In January 2013, Emulex entered into a key employee retention agreement with Jeffrey W. Benck, Emulex's President and Chief Executive Officer (the "**Key Employee Retention Agreement**"). Under the Key Employee Retention Agreement, Emulex provides certain benefits and payments to Mr. Benck in the case of a separation from Emulex. In particular, Mr. Benck is entitled to receive the following payments and benefits in the event of a termination of his employment by Emulex without "cause" or by him for "good reason" (each as defined in the Key Employee Retention Agreement) during the period beginning on the date of the Merger Agreement and ending 24 months after the effective date of a change in control of Emulex (the "**Change in Control Period**"):

- a lump sum cash severance payment equal to 24 months of Mr. Benck's base pay, inclusive of his target incentive payment level with respect to the fiscal year prior to his termination date;
- a lump sum cash payment equal to 24 months of COBRA coverage (health, dental and vision benefits) for Mr. Benck, his spouse and his dependents; and
- full vesting and acceleration of Mr. Benck's stock options and other stock awards and the right to exercise stock options for 12 months following his termination date.

In addition, in connection with the appointment of Mr. Benck as Emulex's Chief Executive Officer in July 2013, Emulex entered into a severance agreement with Mr. Benck (the "**Benck Severance Agreement**"). The Benck Severance Agreement

generally provides for the following benefits to Mr. Benck upon a termination without "cause" or by Mr. Benck for "good reason" (as each term is defined in the Benck Severance Agreement) at any time outside the above-referenced Change in Control Period: (1) payment of any accrued but unpaid compensation, (2) payment of a severance benefit equal to one year's base salary, (3) payment of any deferred incentive bonuses, (4) a cash amount equal to 12 months of COBRA coverage (health, dental, and vision benefits) for Mr. Benck and his spouse and dependents, (5) acceleration of vesting of outstanding equity awards by one year (with any performance-based equity awards vesting at a minimum of the target achievement level), and (6) a payment equal to 100% of his annual target incentive payment as in effect on the date of termination. However, the benefits under the Benck Severance Agreement are only payable if the termination date occurs outside the above-referenced Change in Control Period under Mr. Benck's Key Employee Retention Agreement.

The foregoing summary is qualified in its entirety by reference to the Key Employee Retention Agreement and the Benck Severance Agreement, which are filed as Exhibits (e)(8), (e)(9) and (e)(34) to this Statement and are incorporated herein by reference.

Change in Control Retention Plan

Emulex's remaining executive officers do not have key employee retention agreements but instead participate in Emulex's Change in Control Retention Plan (the "**CIC Plan**"). Under the CIC Plan, the executive officers (other than Mr. Benck) are each entitled to receive the following payments and

benefits in the event of a termination of employment by Emulex without "cause" or by them for "good reason" (each as defined in the CIC Plan) during the Change in Control Period:

- a lump sum cash severance payment equal to 12 months of base pay, inclusive of their target incentive payment level with respect to the fiscal year prior to their termination date;
- a lump sum cash payment equal to the costs of continuation of health insurance premiums for the employee and their eligible dependents for 12 months following the termination of their employment; and
- full vesting and acceleration of their stock options and other stock awards and the right to exercise stock options for a period of 12 months following their termination date.

Mr. Benck's Key Employee Retention Agreement and the CIC Plan also provide these executives with reimbursement of up to $15,000 for outplacement services utilized within the first 12 months following termination of employment. If the severance payment and benefits received by any of these executives would be considered an "excess parachute payment" within the meaning of Section 280G of the Internal Revenue Code of 1986 (the "**Code**"), thereby subjecting the executive to a 20% penalty excise tax, then the severance payment and benefits will be reduced to the extent that a reduction would result in these executives receiving a greater after-tax amount.

In addition, in connection with the appointment of Kyle B. Wescoat as Emulex's Senior Vice President and Chief Financial Officer in January 2014, Emulex entered into a Severance Agreement with Mr.

Wescoat (the "**Wescoat Severance Agreement**"). The Wescoat Severance Agreement provides certain benefits, including (1) payment of one year's base salary, (2) a lump sum cash payment equal to the costs of continuation of his health insurance premiums for 12 months following the termination of his employment, and (3) one year acceleration of equity grants (with any performance-based equity awards vesting at a minimum of the target achievement level), in the event Mr. Wescoat's employment is terminated during the first two years of his employment by Emulex without "cause" or by him for "good reason" (as each such term is defined in the Wescoat Severance Agreement). However, the benefits under the Wescoat Severance Agreement are only payable if the termination date occurs outside the above-referenced Change in Control Period.

The foregoing summary is qualified in its entirety by reference to the CIC Plan and the Wescoat Severance Agreement, which are filed as Exhibits (e)(7) and (e)(29) to this Statement and are incorporated herein by reference.

Potential Payments Upon a Termination in Connection with a Change in Control

The following table describes the potential payments to the executive officers upon an eligible termination without cause by Emulex or by the executive officer for good reason (as defined within the executive officer's Key Employee Retention Agreement or the CIC Plan, as applicable) due to a change in control assuming that the Effective Time occurred on April 3, 2015 and each executive officer experiences a simultaneous eligible termination:

* * *

[Chart and Notes Thereto Omitted from Joint Appendix. Omitted Materials Available at ER83-84.]

Post-Closing Employee Benefits

The Merger Agreement provides that, for 12 months following the Effective Time, Avago will provide, or will cause to be provided, to each Emulex Employee (1) an annual base salary or base wages and short-term incentive compensation opportunities and (2) benefits (including severance benefits) that are substantially comparable, in the aggregate, to the benefits provided to similarly situated employees of Avago or its subsidiaries.

For purposes of vesting, eligibility to participate and levels of benefits (but not benefit accrual under any defined benefit plan or vesting under any equity incentive plan) under the employee benefit plans of Avago and its subsidiaries in which Emulex Employees first become eligible to participate after the Effective Time (the "**New Plans**"), each Emulex Employee will be credited with his or her years of service with Emulex and its subsidiaries and their respective predecessors before the Effective Time, to the same extent as such Emulex Employee was entitled, before the Effective Time, to credit for such service under any similar employee plan of Emulex or its subsidiaries in which such Emulex Employee participated or was eligible to participate immediately prior to the Effective Time, except that the foregoing will not apply to the extent that its application would result in a duplication of benefits with respect to the same period of service. In addition, Avago will use its commercially reasonable

efforts to cause (1) each Emulex Employee to be immediately eligible to participate, without any waiting time, in any and all New Plans and (2) for purposes of each New Plan providing medical, dental, pharmaceutical and/or vision benefits to any Emulex Employee, all pre-existing condition exclusions and actively-at-work requirements of such New Plan to be waived for such Emulex Employee and his or her covered dependents, to the extent such conditions were inapplicable or waived under the comparable employee plan of Emulex or its subsidiaries in which such Emulex Employee participated immediately prior to the Effective Time. Avago will cause any eligible expenses incurred by any Emulex Employee and his or her covered dependents during the plan year that includes the Effective Time to be taken into account for purposes of satisfying all deductible, coinsurance and maximum out-of-pocket requirements applicable to such Emulex Employee and his or her covered dependents under any New Plan (to the extent such amounts would have been taken into account for such requirements under any comparable employee plan of Emulex or its subsidiaries prior to the Effective Time).

Prior to Purchaser's acceptance of the Shares, Emulex agreed to take all required steps to cause each agreement, arrangement or understanding entered into by Emulex or its subsidiaries on or after the date of the Merger Agreement with any of its officers, directors or employees pursuant to which consideration is paid to such officer, director or employee to be approved as an "employment compensation, severance or other employee benefit arrangement" within the meaning of Rule 14d-10(d) under the Exchange Act and to satisfy the

requirements of the non-exclusive safe harbor set forth in Rule 14d-10(d) under the Exchange Act, which requires, among other things, the approval of such agreements, arrangements or understandings by a committee of independent directors of Emulex. Emulex took these steps on February 25, 2015.

The foregoing summary is qualified in its entirety by reference to the Merger Agreement, which is filed as Exhibit (e)(1) to this Statement and is incorporated herein by reference.

Director Compensation

Emulex provides its non-employee directors with compensation pursuant to its non-employee director compensation program. Directors who were not employees of Emulex receive a quarterly retainer of $13,750, $1,500 per meeting attended in excess of 12 meetings during the fiscal year and reimbursement for travel expenses. In addition, the Chairman of the board receives an additional quarterly retainer of $7,500. The Chairman of the Nominating/Corporate Governance Committee receives an additional quarterly retainer of $1,500, while committee members receive an additional quarterly retainer of $1,000; the Chairman of the Compensation Committee receives an additional quarterly retainer of $2,000, while committee members receive an additional quarterly retainer of $1,000; and the Chairman of the Audit Committee receives an additional quarterly retainer of $3,000, while committee members receive an additional quarterly retainer of $2,000. Directors who are employees of Emulex receive no additional compensation for serving on the board. Directors are also entitled to reimbursement for their out-of-pocket expenses in

connection with attendance at Board and committee meetings.

Equity-Based Compensation.

In addition, Emulex maintains the Emulex Corporation Stock Award Plan for Non-Employee Directors (the "**Director Plan**") under which Shares may be issued pursuant to the exercise of stock options, restricted stock awards or stock appreciation rights granted to directors who are not employees of Emulex or any of its subsidiaries. Each director of Emulex is eligible to receive awards under the Director Plan only if such director is not then an employee of Emulex or any of its subsidiaries ("**Plan Eligible Director**"). Only Plan Eligible Directors may receive awards under the Director Plan. There are currently nine Plan Eligible Directors—Ms. Infante and Messrs. Clark, Daichendt, Edwards, Folino, Kelley, Merchant, Nazari and Yoost. The Director Plan provides for option awards to be granted automatically to each Plan Eligible Director upon the date on which such director first becomes a Plan Eligible Director and yearly thereafter upon re-election to the Board. The Board or a designated committee of the Board may grant additional compensation under the Director Plan to Plan Eligible Directors in the form of restricted stock awards or stock appreciation rights which compensation may be in addition to or in lieu of the formula-based option grants.

In fiscal 2015, in lieu of an annual option under the Director Plan and any other restricted stock grants, each Plan Eligible Director received an annual grant of restricted stock equal to $100,000 in market value of common stock based on the closing

price of Emulex's common stock on the date of grant. In addition, in lieu of an initial stock option award under the Director Plan, each newly appointed or elected Plan Eligible Director receives an initial grant of shares of restricted stock equal to $200,000 in market value of common stock based on the closing price of Emulex's common stock on the date of the award with the annual restricted stock award amount being reduced pro-rata for annual stock awards being made within one year after the award of an initial restricted stock award. The restricted stock grants are made in the form of restricted stock awards which automatically entitle their holders to one share of common stock per restricted stock award upon vesting. These restricted stock awards shall vest as to one half of the shares on the date of grant and one half of the shares six months after the date of grant. Pursuant to the Director Plan, the vesting of all outstanding restricted stock and other equity awards held by non-employee directors will be accelerated in full effective as of immediately prior to the Effective Time of the Merger, as described above. However, in connection with the grant of the restricted stock awards on February 18, 2015, each non-employee director signed a letter agreement with Emulex pursuant to which they agreed to waive any acceleration of such director's outstanding restricted stock awards that would otherwise occur upon the consummation of the Merger, notwithstanding the terms of any equity plan or any agreement or instrument related to such restricted stock awards, if the Effective Time occurs prior to the date on which such awards would otherwise vest in accordance with their terms (six months from the date of grant), and to forfeit the number of restricted Shares awarded on

February 18, 2015 had $8.00 been used to calculate the number of restricted Shares awarded rather than $6.39, the closing sales price for Shares on the date of the award. As such, each non-employee director's restricted stock awards will be forfeited for no consideration upon the resignation of such director on or about the Effective Time if the Effective Time occurs prior to the date on which such awards would otherwise vest in accordance with their terms (six months from the date of grant).

Golden Parachute Compensation

For information with respect to arrangements between Emulex and its executive officers described in this Item 3 that constitutes "golden parachute compensation" within the meaning of Item 402(t) of SEC Regulation S-K, please refer to the information included under Item 8—"Additional Information—Golden Parachute Compensation," which is incorporated into this Item 3 by reference.

Director and Officer Indemnification and Insurance

All existing rights to exculpation, indemnification and limitation of liabilities in favor of past and current directors and officers of Emulex provided in Emulex's Certificate of Incorporation, as amended (**"Emulex's Charter"**), Emulex's Amended and Restated Bylaws (**"Emulex's Bylaws"**) or under any indemnification, employment agreement or similar contract currently in effect between Emulex and such past and current directors and officers with respect to acts or omissions in their capacities as directors or officers occurring at or prior to the Effective Time will continue after the Merger in accordance with their respective terms. In addition, from and after the Effective Time, Avago will cause the Surviving

Corporation, to pay and perform in a timely manner such indemnification obligations. For a period of six years from and after the Effective Time, Parent will cause the certificate of incorporation and bylaws of the Surviving Corporation to contain provisions no less favorable with respect to indemnification, exculpation and advancement of expenses of Emulex's directors and officers for periods at or prior to the Effective Time than are currently set forth in Emulex's Charter and Emulex's Bylaws (unless otherwise required by applicable law).

Prior to the Effective Time, Emulex has agreed to obtain and fully pay the premium for the non-cancellable extension of the directors' and officers' liability coverage of Emulex's existing directors' and officers' insurance policies and its existing fiduciary liability insurance policies (collectively, the "**D&O Insurance**"), in each case for a claims reporting or discovery period of at least six years from and after the Effective Time with respect to any claim related to any period of time at or prior to the Effective Time from an insurance carrier with the same or better credit rating as Emulex's current D&O Insurance carrier in an amount and scope at least as favorable as Emulex's existing policies. However, Emulex will not be required to pay an annual premium for the D&O Insurance in excess of 250% of the last annual premium paid prior to February 25, 2015. If the annual premiums of such insurance coverage exceed such amount, Emulex will be obligated to obtain a policy with the greatest coverage available, with respect to matters occurring prior to the Effective Time, for a cost not exceeding such amount.

Emulex's Charter provides that the liability of Emulex's directors to Emulex or its Shareholders for

monetary damages for breach of fiduciary duty is eliminated to the fullest extent permitted by the applicable provisions of the DGCL. Emulex's Bylaws further provide that each person who was or is a party to, is threatened to be made a party to or is involved as a witness in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that such person is or was a director or officer of Emulex, or is or was serving at the request of Emulex as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust or other enterprise, will be indemnified by Emulex against all expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person in connection with such action, suit or proceeding to the fullest extent permitted by Delaware law and Emulex's Charter.

Emulex's Bylaws further provide that expenses incurred by an officer or director in defending such a civil or criminal action, suit or proceeding will be paid by Emulex in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of the director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by Emulex.

Emulex has entered into agreements with its directors and officers that require Emulex to indemnify such persons against expenses, damages, losses, liabilities, judgments, fines, penalties, settlements, assessments and other charges paid or payable (including expenses of a derivative action) in connection with any proceeding, whether actual or

threatened, to which any such person may be made a party by reason of the fact that such person is or was a director, officer, employee or agent of Emulex or a director, officer, employee, member, manager, trustee or agent of any other entity as to which such person was serving at the request of Emulex, provided such person acted in good faith and in a manner that such person reasonably believed to be in or not opposed to the interests of Emulex and, with respect to any criminal proceeding, had no reasonable cause to believe his or her conduct was unlawful (the "**Indemnification Agreement**"). The Indemnification Agreement also sets forth certain procedures that will apply in the event of a claim for indemnification thereunder. Emulex has obtained a policy of directors' and officers' liability insurance that insures Emulex directors and officers against the cost of defense, settlement or payment of a judgment under certain circumstances.

The foregoing summary is qualified in its entirety by reference to Emulex's Charter, Emulex's Bylaws and the form of Indemnification Agreement, which are filed as Exhibit (e)(4), (e)(5) and (e)(6) to this Statement, respectively, and are incorporated herein by reference.

Arrangements between Emulex and Avago

Merger Agreement

The Merger Agreement, a copy of which is filed as Exhibit (e)(1) to this Statement and is incorporated herein by reference, governs the contractual rights among Avago, Purchaser and Emulex in relation to the Transaction. The Merger Agreement has been filed as an exhibit to this Statement to provide Shareholders with information regarding the terms of

the Merger Agreement and is not intended to modify or supplement any factual disclosures about Avago, Purchaser or Emulex in Emulex's public reports filed with the SEC.

The summary of the material provisions of the Merger Agreement contained in the Offer to Purchase in the Section titled "The Merger Agreement; Other Agreements" and the description of the conditions of the Offer contained in the Section titled "Terms of the Offer" are incorporated herein by reference. Such summary and description are qualified in their entirety by reference to the Merger Agreement.

The Merger Agreement and the summary of terms set forth in the Offer and incorporated by reference herein are not intended to be, and should not be relied upon as, disclosure regarding any facts and circumstances relating to Avago, Purchaser or Emulex. The representations and warranties contained in the Merger Agreement were negotiated by the parties with the principal purpose of establishing the circumstances in which Avago or Purchaser may have the right not to consummate the Offer or the Merger, or a party may have the right to terminate the Merger Agreement if the representations and warranties of the other party prove to be untrue due to a change in circumstance or otherwise, and to allocate risk between the parties, rather than establishing matters as facts. Also, the assertions embodied in those representations and warranties were made solely for purposes of the Merger Agreement and may be subject to important qualifications and limitations agreed to by the parties in connection with negotiating the terms of the Merger Agreement, including contractual standards of materiality or material adverse effect different

from those generally applicable to shareholders and qualifications with respect to information set forth in confidential schedules. Accordingly, Shareholders and other interested parties should not rely on the representations and warranties contained in the Merger Agreement as matters of fact.

Tender and Support Agreement

Concurrently with entering into the Merger Agreement, certain of Emulex's directors and executive officers (the "**Signing Shareholders**") entered into a Tender and Support Agreement with Avago and Purchaser (the "**Tender and Support Agreement**") pursuant to which they agreed, among other things, to tender all of their Shares in the Offer, unless the Merger Agreement is terminated. In the aggregate, the Signing Shareholders beneficially owned approximately 2.5% of the outstanding Shares of Emulex as of February 25, 2015. The foregoing description of the Tender and Support Agreement is qualified in its entirety by reference to the full text of the Tender and Support Agreement, a copy of which is attached as Exhibit (e)(2) to this Statement and is incorporated herein by reference.

Confidentiality Agreement

On August 28, 2014, Emulex and Avago's Parent entered into a confidentiality agreement (the "**Confidentiality Agreement**"). Under the Confidentiality Agreement, the parties agreed that, except as provided in the Confidentiality Agreement, any non-public information regarding either Emulex or Avago's Parent furnished by one party (the "**Disclosing Party**") to the other party or its representatives (the "**Recipient**") in connection with a possible transaction, together with any notes,

reports, analyses, compilations, studies, interpretations, summaries or other documents prepared by the Recipient or its representatives to the extent they contain or reflect such information, would, for a period lasting two years from the date of the Confidentiality Agreement be used by the Recipient and its representatives solely for the purpose of evaluating, negotiating and performing a possible transaction and be kept confidential. The Confidentiality Agreement contains a non-solicitation provision prohibiting each party from, either directly or indirectly, soliciting for employment or otherwise hiring any officer or employee of the other party to whom such party was introduced or who became known to such party in connection with the evaluation of a possible transaction and who is or was employed in a management-level capacity by the Disclosing Party or its subsidiaries for a period of 12 months from the date of the Confidentiality Agreement, subject to certain exceptions. The Confidentiality Agreement also contains a standstill provision which prohibits either party from acquiring shares of the other party's stock or soliciting proxies, making a tender offer or forming a partnership, syndicate or other group with respect to the other party's stock, without the consent of the other party until the earlier of August 31, 2015 or a Significant Event (as defined in the Confidentiality Agreement). The above summary of certain provisions of the Confidentiality Agreement is qualified in its entirety by reference to the Confidentiality Agreement, a copy of which is filed as Exhibit (e)(3) to this Statement and incorporated herein by reference.

Item 4. The Solicitation or Recommendation

Recommendation of the Board

On February 25, 2015, the Board unanimously (1) determined that the transactions contemplated by the Merger Agreement, including the Offer and the Merger, are fair to, and in the best interests of, Emulex and its Shareholders, (2) approved and declared advisable the Merger Agreement and the Transaction, including the Offer and the Merger, and (3) recommended that Shareholders accept the Offer, tender their Shares to Purchaser in the Offer and, to the extent applicable, approve and adopt the Merger Agreement and the Merger.

Accordingly, for the reasons described in more detail below, the Board unanimously recommends that Shareholders accept the Offer and tender their Shares in the Offer and, if required under applicable law to effect the Merger, approve and adopt the Merger Agreement and the Merger.

A copy of the letter to Shareholders, dated April 7, 2015, communicating the recommendation of the Board is included as Exhibit (a)(2) to this Statement and is incorporated herein by reference.

Background of the Transaction

In October 2012, Elliott Associates, L.P. and affiliated entities (together, "**Elliott**") reported in a filing with the SEC that Elliott had acquired 7.1% of Emulex's outstanding Shares. By November 2012, Elliott had increased its ownership to approximately 10% of the outstanding Shares. Over the next four months, representatives of Emulex and of Elliott engaged in conversations regarding actions that Elliott suggested Emulex consider to increase shareholder value, including the potential sale of

Emulex. Throughout these discussions, representatives of Emulex informed representatives of Elliott that Emulex did not oppose consideration of strategic alternatives for Emulex, and initiated a process to review such alternatives in March 2013. However, representatives of Emulex noted that Emulex was a party to ongoing patent litigation involving Broadcom Corporation ("**Broadcom**") which not only required substantial focus by Emulex's senior management but, in management's view, could adversely affect the willingness of some third parties to engage in substantive discussions with Emulex regarding a sale or other strategic transaction.

During these discussions, representatives of Elliott also requested that Emulex consider increasing the size of the Board and adding additional members who could assist in the Board's assessment of Emulex's strategic alternatives. In March 2013, Emulex agreed to expand its Board and add two members, each of whom was discussed with Elliott in the course of the Board's evaluation of them as candidates for the Board. Elliott in turn agreed to certain standstill restrictions with respect to proxy contests, takeover bids and similar actions through August 2014.

In March 2013, the Board established an ad hoc committee of four independent directors to oversee the day-to-day conduct of the strategic assessment process: Eugene J. Frantz, Gregory S. Clark, Robert H. Goon and Bruce C. Edwards. The committee was not formed to address any perceived conflict of interest in respect of the strategic assessment process, but rather was formed as a matter of convenience to oversee the conduct of the strategic assessment process during the period between

regularly scheduled Board meetings. The committee did not have the authority to approve a strategic transaction. The committee met on seven occasions and reported to the full Board with respect to each meeting.

In May 2013, Emulex formally retained Goldman, Sachs & Co. ("**Goldman Sachs**") to assist in Emulex's assessment of strategic alternatives, after having consulted informally with representatives of Goldman Sachs from time to time since October 2012. Over the next five months, the Board and the ad hoc committee, with the assistance of representatives of Goldman Sachs and Jones Day, Emulex's legal counsel, engaged in a review of Emulex's strategic alternatives, including a possible sale or other business combination transaction involving Emulex. The Board or the ad hoc committee met on 12 occasions during this five-month period to receive reports from, and provide direction to, management and representatives of Goldman Sachs and Jones Day. Throughout this process, the directors received advice from representatives of Jones Day as to the directors' fiduciary duties, and reports and financial advice from representatives of Goldman Sachs.

With the assistance of representatives of Goldman Sachs, in May 2013, Emulex identified 11 private equity firms and seven operating companies that Emulex thought could be reasonably expected to have an interest in pursuing discussions concerning a strategic transaction involving Emulex. Nine of the 11 private equity firms and two of the seven operating companies so identified signed confidentiality agreements that were substantially similar and included standstill provisions.

The standstill provisions had terms ranging from 12 to 18 months. Some of these agreements were subsequently extended, but all standstill provisions that continued at the time of Emulex's execution of the Merger Agreement either terminated in accordance with their terms or, prior to Emulex's execution of the Merger Agreement, Emulex waived any provisions therein that precluded the party from making a competing proposal.

All participants in the strategic assessment process that signed confidentiality agreements were provided access to nonpublic information relating to Emulex (including through a virtual data room) and were offered the opportunity to receive extensive presentations by Emulex's management. Eight of the private equity firms and the two operating companies that signed confidentiality agreements received management presentations.

Emulex worked with another investment banking firm (with which it had consulted in respect of strategic alternatives prior to retaining Goldman Sachs) to develop indicative financing terms for potential acquirers. Emulex requested that private equity bidders submit bids based on the indicative terms developed by such firm as part of its efforts to maintain confidentiality of the strategic assessment process.

In September 2013, representatives of Goldman Sachs, as directed by the Board and on behalf of Emulex, requested that potential bidders submit firm proposals for a potential strategic transaction, including providing a markup of a transaction agreement prepared by Jones Day and evidence of financing.

At a meeting held on September 25, 2013, the Board, with the assistance of representatives of Goldman Sachs and Jones Day, reviewed the status of the third-party outreach process. At the meeting, representatives of Goldman Sachs updated the Board generally with respect to the process and reported that one of the private equity firms ("**Sponsor A**") which had provided an initial preliminary indication of interest at $7.00 – $7.75 per Share and had spent a substantial amount of time in due diligence relating to a possible acquisition, informed Emulex that it would not submit a proposal for the acquisition of all of the outstanding Shares. A representative of Sponsor A orally indicated a willingness to consider sponsoring a leveraged recapitalization alternative in which Sponsor A would purchase $125 million aggregate amount of Emulex preferred stock convertible into Shares at $9.60 per Share with class voting rights to initially elect 3 – 4 members of the Board and bearing a 12.5% pay-in-kind dividend. The representative of Sponsor A suggested that the net proceeds of the preferred issuance, together with third-party borrowings (which had not been arranged) and cash on hand, could be used to support an approximately $500 million leveraged recapitalization predicated on an $8.00 per Share valuation. It was the consensus of the Board that Sponsor A's recapitalization concept appeared unattractive in that, if completed, Emulex would be highly leveraged, the liquidity of the trading market for Shares remaining outstanding after the recapitalization would be substantially reduced and, if Emulex were to determine to pursue a substantial return of cash to Shareholders in lieu of a sale, it had

sufficient financial resources to do so without the issuance of equity capital to a third party.

At the September 25th meeting, the Board authorized management to inform another of the private equity firms participating in the process ("**Sponsor B**"), which had communicated to representatives of Goldman Sachs a preliminary indication of interest at $9.25 per Share, and a subsequent indication of interest at $7.25 per Share, that it could, subject to confidentiality undertakings, discuss its potential interest in Emulex with representatives of Elliott in an effort to increase its then-indicated price above $7.25 per Share.

At a meeting held on October 17, 2013, the Board, with the assistance of representatives of Goldman Sachs and Jones Day, reviewed the status of the third-party outreach process. At the meeting, representatives of Goldman Sachs reported that the two operating companies that had signed confidentiality agreements and received nonpublic information declined to pursue a strategic transaction involving Emulex, that the circumstances involving Sponsor A had not changed since the Board's meeting on September 25, 2013 and that two of the private equity firms made proposals, neither of which constituted a firm bid:

- one of the private equity firms, which had provided an initial preliminary indication of interest at $8.50 – $9.00 per Share, submitted an indication of interest in the range of $7.25 – $7.50 per Share (subsequently confirmed to be $7.25 per Share), but did not submit a markup of the form of transaction agreement or evidence of financing, and informed Emulex that it was

unable to submit a firm bid without three to four weeks of additional due diligence; and

- Sponsor B, which had provided an initial preliminary indication of interest at $9.25 per Share and submitted a subsequent indication of interest at $7.25 per Share, increased its indication of interest to $7.35 after Sponsor B discussed its indication of interest with representatives of Elliott under a confidentiality undertaking. Sponsor B's indication of interest included a mark-up of the form of transaction agreement and a letter from the investment bank identified by Emulex for purposes of the strategic assessment process indicating that it was "highly confident" that financing could be arranged. Nonetheless, Sponsor B stated that it required two to three weeks of additional due diligence.

Following input from management and representatives of Goldman Sachs and advice from Jones Day, including with respect to the fiduciary duties of the directors, the Board determined at its October 17, 2013 meeting that Emulex should suspend the third-party outreach process in light of what the Board deemed to be low proposed prices in the indications of interest, the absence of a firm bid from any potential acquirer and the fact that the Broadcom litigation was scheduled to go to trial in 2014. The Board instead directed Emulex's management to consider other possible alternatives to increase shareholder value, including a possible substantial return of cash to Shareholders. In light of the Board's decision to suspend the third-party outreach process, the ad hoc committee established in

March 2013 recommended that it be disbanded, which recommendation was accepted by the Board on November 21, 2013.

During the October 17th Board meeting and over the course of the next several weeks, management, with the assistance of representatives of Goldman Sachs and Jones Day, evaluated various alternatives by which Emulex could enhance shareholder value. At a meeting on November 10, 2013, in which representatives of Goldman Sachs and Jones Day participated, the Board determined to pursue a three-part program designed to improve Emulex's results of operations and enhance shareholder value. The program, which Emulex publicly announced on November 11, 2013, provided for:

- a $200 million Share repurchase program, financed by the issuance of $175 million aggregate principal amount of the Notes and cash on hand;
- a $30 million per year cost-reduction program (in addition to $10 million per year of cost reductions announced earlier in 2013); and
- the retirement from the Board of four directors, including its executive chairman, to be replaced with three new directors (following consultation with Elliott) at Emulex's next annual shareholders' meeting.

On March 31, 2014, Emulex and Broadcom entered into a dismissal and standstill agreement, and Broadcom's complaint was dismissed without prejudice in April 2014. For additional information on the dismissal and standstill agreement, see Item 1.01 ("Entry Into A Material Definitive Agreement") of Emulex's Current Report on Form 8-K filed by

Emulex on March 31, 2014 and Note 10 ("Commitments and Contingencies") in the notes to the consolidated financial statements under the caption "Litigation" in Part IV, Item 15(a) of Emulex's Annual Report on Form 10-K filed by Emulex on August 28, 2014.

In May 2014, the trading prices of Emulex's shares declined significantly following Emulex's announced financial results and next-quarter guidance on April 30, 2014. Also during May 2014, Sponsor A and Sponsor B each contacted Emulex for an update on Emulex's business, indicating a potential renewed interest in pursuing a potential strategic transaction involving Emulex. Emulex's management and Board began to consider whether to continue the strategic alternatives process. The matter was reviewed at a meeting of the Board held on May 20, 2014 in which a representative of Jones Day participated. At that meeting, the Board determined to continue the process and authorized management, with the assistance of representatives of Goldman Sachs, to conduct discussions with, and furnish additional information to, Sponsor A and Sponsor B.

During the period from May to August 2014, Emulex had discussions with, and furnished additional nonpublic information to, both Sponsor A and Sponsor B pursuant to renewed confidentiality agreements, which included access to information in an updated virtual data room, extensive management presentations and responses by Emulex management and representatives of Goldman Sachs to follow-up information requests. Updates and information about the process were received by the Board at meetings held on June 19, 2014 and August 5, 2014.

The Board reviewed the status of the process at a meeting on August 20, 2014 in which representatives of Goldman Sachs and Jones Day participated. At that meeting, representatives of Goldman Sachs reported that Sponsor A submitted a written proposal to acquire Emulex at a price range of $5.25 – $5.50 per Share in cash, and that Sponsor B orally indicated a price of $6.00 per Share in cash to acquire Emulex and that it would be willing to do additional work only if it was granted exclusivity. The closing sales price for Emulex shares was $5.33 per Share on August 19, 2014, the last trading day prior to the meeting. The Board determined, after consultation with representatives of Goldman Sachs, that the indicated prices were inadequate, and that Emulex's management should suspend further discussions with Sponsor A and Sponsor B. The Board also discussed approaching operating companies that, based in part on advice from Goldman Sachs, were believed to possibly have an interest in Emulex's business and might have significant synergies based on their own business strategies. In consultation with representatives of Goldman Sachs, the Board directed management to approach two such operating companies regarding their potential interest in a transaction with Emulex, one of which ("**Company A**") had approached Emulex in July 2014 regarding a possible strategic transaction and the second of which was Avago.

On July 23, 2014, a representative of Emulex met with a representative of Company A. During such meeting, the representative of Company A expressed a potential interest in pursuing a strategic transaction involving Emulex. Company A signed a

confidentiality agreement, received a management presentation and conducted substantial due diligence.

On August 23, 2014, a representative of Goldman Sachs contacted a representative of Avago to determine if Avago would be interested in exploring a strategic transaction involving Emulex. On August 24, 2014, a representative of Avago expressed an interest in having a meeting to discuss Emulex's business. Emulex entered into the Confidentiality Agreement with Avago on August 28, 2014 and thereafter Emulex made nonpublic information available to Avago.

Representatives of Emulex made presentations to representatives of Avago on September 4, 18 and 19, 2014 and continued to make nonpublic information regarding Emulex available to Avago, including internal financial forecasts prepared by management regarding the anticipated future financial and operating performance of Emulex for the years 2015 through 2017. Mr. Benck met with Avago's CEO at his request to discuss Emulex and its business on September 18, 2014. However, on September 30, 2014, representatives of Avago informed a representative of Emulex that it was not interested in further pursuing a potential strategic transaction involving Emulex at that time.

Emulex continued to make presentations to, and engage in discussions with, Company A during the September – October 2014 period. However, on October 29, 2014, a representative of Company A informed a representative of Emulex that it was not interested in pursuing a possible strategic transaction involving Emulex.

On January 7, 2015, a representative of Avago contacted Mr. Benck to discuss Avago's possible renewed interest in Emulex and set up a subsequent meeting on January 14, 2015, which, after consulting with the Chairman of the Board, an independent director, Mr. Benck and Jeff Hoogenboom, Emulex's Senior Vice President of Worldwide Sales, attended, along with Avago's CEO and other representatives. During that meeting, the Emulex representatives described progress in Emulex's business since the Fall of 2014 and preliminary financial results for the first half of its current fiscal year. The Emulex representatives also provided Avago an updated revenue forecast for Emulex's connectivity division ("**ECD**") business segment for fiscal year 2015 that took into account Emulex's estimated actual revenue for the first half of the 2015 fiscal year. See "Additional Information—Forecasted Financial Information" in Item 8. Representatives of Avago indicated that they would assess this information and contact Emulex if Avago had a renewed interest in discussions of a potential strategic transaction.

On January 26, 2015, Avago submitted a written proposal to acquire Emulex at a price of $7.50 per Share in cash, subject to further due diligence and the negotiation of definitive documentation. Avago indicated that it believed that it was in the interest of both Emulex and Avago that any transaction be negotiated efficiently. A representative of Avago informed Emulex that, for that reason, Avago's proposal was subject to a potential transaction agreement with Emulex being based on the merger agreement employed in Avago's acquisition of PLX Technology, Inc. ("**PLX**") in August 2014. Avago noted that the PLX merger agreement was publicly

available, had been fully negotiated and represented what Avago believed to be appropriate terms and conditions for a transaction with Emulex. Avago's proposal also included a request for a 45-day period of exclusivity.

Emulex's management informed the Board of the receipt of Avago's January 26th proposal and reviewed it at a regularly scheduled Board meeting on January 27, 2015. At the January 27th meeting, the Board determined to solicit advice from Goldman Sachs and Jones Day at a special meeting of the Board on January 31, 2015.

The Board met on January 31, 2015 to review Avago's January 26th proposal. Representatives of Goldman Sachs and Jones Day participated in the meeting. At the meeting, a representative of Jones Day advised the Board with respect to the directors' fiduciary duties in the circumstances. Management reviewed with the Board its updated financial forecast for the second half of fiscal year 2015 through 2019. See "Additional Information—Forecasted Financial Information" in Item 8 below. The representatives of Goldman Sachs reviewed Goldman Sachs' preliminary observations regarding Avago's proposal. Goldman Sachs' presentation included preliminary financial analyses, a review of the strategic alternatives processes undertaken by Emulex in which representatives of Goldman Sachs had been involved since it was retained in May 2013, including a review of the results of Emulex's outreach to third parties, and Goldman Sachs' views as to possible alternative bidders. The representatives of Goldman Sachs and management indicated that they believed that there was not a reasonable possibility that private equity firms would pursue the

acquisition of Emulex at the $7.50 per share initial price level indicated by Avago based on the indications received from Sponsor A and Sponsor B in August 2014 and Goldman Sachs' and management's analysis regarding what a private equity purchaser could pay in light of current market conditions for the debt and equity necessary to finance such a transaction. The representatives of Goldman Sachs and management further indicated that they believed that the universe of potential alternative strategic bidders for Emulex was limited.

The Board also engaged in an extensive discussion of Emulex's business plan, and risks and opportunities presented for Emulex to continue as a stand-alone company. Following these analyses and discussions, the Board determined that management should continue discussions with representatives of Avago to determine whether Avago would be willing to increase its indicated price. The Board directed Mr. Benck to continue to work closely with the Chairman of the Board to determine the best negotiating approach. While the Board did not determine whether to accept exclusivity as a condition to proceeding with discussions with Avago at the January 31st meeting, management was directed to leave the possibility open and focus on seeking to convince Avago to substantially increase its indicated price at this phase of the discussions.

Over the course of the next week, Mr. Benck, in regular consultation with the Chairman of the Board, conducted price discussions with a representative of Avago. Mr. Benck initially proposed a price of $8.50 in cash per Share, which the representative of Avago rejected outright, and indicated that Avago was reluctant to increase its indicated price above the

$7.50 in cash per Share price which Avago had proposed on January 26, 2015. After Emulex responded to requests for additional information, however, Avago increased its indicated price to $7.75 in cash per Share in a letter dated February 4, 2015. Following further discussions with the Board's Chairman, Mr. Benck informed Avago that he believed that Avago had to increase the price indicated in its February 4th proposal before the Board would proceed further. On February 5, 2015, Avago delivered another written proposal, increasing its indicated price to $8.00 in cash per Share, subject to substantially the same terms as its January 26th proposal.

Avago's February 5th proposal reiterated the request for exclusivity and the condition that a transaction be based on the PLX documentation in order to reach a signed agreement quickly. Specifically, a representative of Avago advised Mr. Benck that Avago's proposal was based on the expectation that a definitive agreement would be executed by late February to facilitate an announcement in conjunction with Avago's first quarter earnings. Representatives of Avago also informed Emulex that, if the parties were unable to execute a merger agreement prior to Avago's release of first quarter earnings, it was possible that Avago would need to delay further pursuit of the transaction for a significant period and turn its attention to other projects.

In various discussions on February 6, 2015, and in consultation with the Board's Chairman, Mr. Benck continued to encourage Avago to further increase its price above $8.00 in cash per Share, but Avago declined to do so.

The Board met on February 7, 2015 to consider Avago's February 5, 2015 proposal. Representatives of Goldman Sachs and Jones Day participated in the meeting. Based on Emulex's previous third-party outreach efforts and input from representatives of Goldman Sachs, the Board determined that private equity firms would not be competitive at the indicated value of $8.00 per share in cash. With input from Emulex's management and the representatives of Goldman Sachs, the Board reviewed possible additional strategic bidders that were in Emulex's industry, including Company A and three other companies ("**Company B**", "**Company C**" and "**Company D**").

The Board was aware that Company A had informed Emulex on October 29, 2014 that it was not interested in pursuing a strategic transaction with Emulex, and management noted that Company A would require third-party financing or the payment of a substantial portion of the purchase price in Company A stock, which would require that Emulex conduct substantial due diligence with respect to Company A. For these reasons, the Board determined that Company A was not reasonably likely to be a viable candidate for outreach.

The Board determined, based on prior discussions, that Company B would be unlikely to be interested in a strategic transaction with Emulex because of Company B's lack of interest in pursuing a transaction in the prior third-party outreach efforts. For this reason, the Board determined that it was not likely that Company B would be a viable candidate for outreach.

The Board noted that the likelihood of a transaction with Company C was low both because

Company C would probably need to raise external financing to acquire Emulex and there would be substantial closing risk associated with any transaction with Company C because of regulatory requirements. For these reasons, the Board determined that it was not likely that Company C would be a viable candidate for outreach.

The Board determined, based on prior discussions, that Company D would be unlikely to be interested in a strategic transaction with Emulex because of Company D's lack of interest in pursuing a transaction in prior third-party outreach efforts. For this reason, the Board determined that it was not likely that Company D would be a viable candidate for outreach.

Against this background, the Board directed Emulex's management to continue discussions with Avago and, if required by Avago, enter into a 30-day exclusivity agreement having such other terms as were recommended by Jones Day and approved by the Board's Chairman.

Over the course of the next ten days, Emulex furnished additional due diligence information to Avago, and representatives of Latham & Watkins LLP ("**Latham & Watkins**"), counsel to Avago, and Jones Day engaged in discussions on the draft exclusivity agreement, which Avago had furnished on February 5, 2015. On February 10, 2015, a representative of Latham & Watkins informed a representative of Jones Day that Avago would not require exclusivity.

In light of the withdrawal of the request for exclusivity, representatives of Goldman Sachs, after consultation with and at the direction of Emulex's

management and the Chairman of the Board, contacted Company B and Company D, both of which had been contacted in 2013, to determine whether they might be willing to pursue a possible acquisition of Emulex because each had the financial resources to pursue a transaction on a relatively expedited basis and management and Goldman Sachs believed that it was possible that they might have an interest despite the fact that they had indicated otherwise in 2013. As the Board discussed in its February 7th meeting, Company A, which had done substantial due diligence in the July October 2014 period, had informed Emulex that it was not interested in pursuing a strategic transaction and was believed to lack sufficient capital resources to pursue an all-cash transaction expeditiously. As the Board also discussed in its February 7th meeting, the Board believed that Company C was not a viable candidate for outreach because Company C would probably need to raise external financing to acquire Emulex and there would be substantial closing risk associated with any transaction with Company C because of regulatory requirements.

Latham & Watkins furnished a draft of the merger agreement on February 11, 2015.

Jones Day and Latham & Watkins then exchanged drafts of the Merger Agreement on each of February 15, 2015 and February 17, 2015.

The Board met on the evening of February 17, 2015 prior to its regularly scheduled meeting the next day. During that meeting, the Board reviewed Avago's proposal and engaged in extensive discussions. Representatives of Jones Day participated in the February 17th meeting and provided a general description of the merger

agreement furnished by Latham & Watkins. Emulex's management updated the Board with respect to ongoing due diligence and related activities. In the February 17th meeting, Mr. Benck reported that Avago's CEO had requested a meeting with Mr. Benck on February 20, 2015, which the Board authorized Mr. Benck to attend if the key terms of a possible transaction were agreed to in principle by that time.

The Board held its regularly scheduled meeting on February 18, 2015 in connection with Emulex's annual meeting of shareholders. At the conclusion of the meeting, the Board discussed what action to take with respect to the $100,000 in value of restricted stock to be awarded after each annual meeting to each non-employee director under the Director Plan for Non-Employee Directors (the "Director Stock Plan"), half of which vested on grant and half of which vested six months thereafter. In light of the ongoing discussions with Avago and outreaches to Companies B and D, after consultation with Jones Day, each director signed a letter agreement with Emulex pursuant to which he or she agreed to waive any acceleration of such director's outstanding restricted stock awards that would otherwise occur upon the consummation of the Merger, notwithstanding the terms of any equity plan or any agreement or instrument related to such restricted stock awards, if the Effective Time occurs prior to the date on which such awards would otherwise vest in accordance with their terms (six months from the date of grant), and to forfeit the number of restricted Shares awarded on February 18, 2015 had $8.00 been used to calculate the number of restricted Shares awarded rather than

$6.39, the closing sales price for Shares on the date of the award.

The Board held a special meeting on February 21, 2015. Representatives of Goldman Sachs and Jones Day participated in the meeting. A representative of Jones Day reviewed the Board's fiduciary duties in the circumstances. The representative of Jones Day then reported that, since February 18, 2015, representatives of Latham & Watkins and Jones Day had continued to negotiate and exchange drafts of the transaction documentation on a substantially continuous basis. In addition, management reported that, throughout this period, Avago conducted additional due diligence and representatives of Emulex responded to questions. A representative of Jones Day then reviewed the material terms of the draft Merger Agreement, a summary of which, along with the draft Merger Agreement itself, had been provided to the Board prior to the meeting. The representative of Jones Day noted that the parties were still discussing whether certain foreign pre-merger and other regulatory clearances would be conditions to closing.

A representative of Jones Day then reviewed the proposed breakup fee of $19.5 million, representing approximately 3.2% of Emulex's total equity consideration in the transaction, or approximately $0.26 per fully diluted Share, which had been heavily negotiated during the course of the discussions. The representative of Jones Day also informed the Board that Avago was requiring that each Board member and Emulex's named executive officers sign the Tender and Support Agreement in which they agreed, subject to certain exceptions, to tender their Shares and not to solicit alternative transactions. The

representative of Jones Day then reviewed the material terms of the draft Tender and Support Agreement.

The representative of Jones Day then reviewed the provisions of the Merger Agreement and the possible transaction as to which directors and officers had interests that could be said to be in addition to, or different from, the interests of the Shareholders generally, including the provisions for treatment of equity awards and employee-related provisions, and the indemnification and insurance provisions of the draft Merger Agreement. The representative of Jones Day reviewed in detail the "no-shop" covenants, as well as the terms of the draft Merger Agreement that would permit Emulex to engage in discussions with, and provide information to, potential third-party bidders, the covenants relating to the Board's recommendation and ability to change the recommendation for an alternative transaction or intervening event, Avago's obligation to extend the Offer in certain circumstances, the closing conditions and the proposed end date by which the Merger Agreement could be terminated if the Offer was not completed, which the representative of Jones Day recommended be eight months from signing. Finally, the representative of Jones Day noted that non-tendering Shareholders would have the right to exercise appraisal rights if the Merger was completed, and that Avago's closing obligations were not conditioned on the absence of the assertion of appraisal rights at any level. Another representative of Jones Day then reviewed the pre-merger notification and clearance requirements under the HSR Act applicable to a transaction involving Avago, noting that the parties were still assessing whether

certain foreign antitrust clearances would be required.

Mr. Benck reported that, as previously discussed with the Board, on February 20, 2015, Mr. Benck had met with Avago's CEO. During the meeting, they discussed various due diligence topics, the future of Emulex's business and the industry generally and how the Emulex management team might fit within the Avago organization. They also discussed the possibility of Mr. Benck continuing as manager of the Emulex business unit within Avago if the parties reached agreement, but agreed to defer any further discussion of the matter and potential terms until such time, if it occurred, as the Merger Agreement was signed and the transaction announced.

Representatives of Goldman Sachs then reported on conversations with Company B and Company D. They reported that, while Company B had said that Emulex was not among the companies it was considering for a possible acquisition, it had initially agreed to reconsider the possibility, but had ultimately reaffirmed that Company B would not be able to consider the matter at the present time and therefore Company B would not participate in any process. Representatives of Goldman Sachs noted that Company D's only response to date had been that it was still considering the matter.

A representative of Goldman Sachs then led an extensive discussion of Goldman Sachs' analysis of the possible transaction from a financial point of view based on the indicated price of $8.00 in cash per Share. He noted that Goldman Sachs' preliminary analysis, based on the work undertaken to date, on the factors and assumptions described and on the forecasts of Emulex's management, indicated that the

$8.00 in cash per Share was in excess of the standalone value of Emulex indicated in Goldman Sachs' analysis. He also noted that $8.00 in cash per Share represented a 25% premium to the closing trading price on February 19, 2015 and a 34% premium to the 90-day trading average price on February 19, 2015. He reviewed the multiples that $8.00 in cash per Share implied and compared those to trading multiples for selected companies, reviewed Emulex's potential Share price based on certain multiples and management's forecasts and reviewed Goldman Sachs' preliminary discounted cash flow analysis.

The Board also considered, in addition to the legal and financial considerations, Emulex's prospects as an independent publicly traded company, the terms of the documentation that had been negotiated to date and the potential effects on Emulex if a transaction were announced but not completed. Weighing all these factors, the Board, after receiving the advice of management and Emulex's advisors, determined that Emulex should continue to seek to finalize the Merger Agreement, recognizing that Company D could present an indication of interest that would warrant consideration.

The Board held a special meeting on February 25, 2015. Representatives of Goldman Sachs and Jones Day participated in the meeting. A representative of Jones Day described the changes that had been negotiated in the transaction documents since the February 21st Board meeting. Representatives of Goldman Sachs informed the Board that a representative of Company D had informed Goldman Sachs that Company D had no interest in pursuing a possible strategic transaction with Emulex.

Representatives of Goldman Sachs then provided Goldman Sachs' analysis of the proposed transaction. At the conclusion of the presentation, a representative of Goldman Sachs presented Goldman Sachs' oral opinion to the Board that, as of February 25, 2015 and based upon and subject to the factors and assumptions set forth therein and reviewed at the February 25th meeting, the $8.00 in cash per Share to be paid to the holders (other than Avago and its affiliates) of Shares pursuant to the Merger Agreement is fair from a financial point of view to such holders. Goldman Sachs' oral opinion was subsequently confirmed in writing and is attached as Annex A to this Statement. See "—Opinion of the Financial Advisor to the Emulex Board" below in this Item 4.

Following discussion, the Board, for the reasons more fully described in "—Reasons for the Recommendation" below in this Item 4, unanimously (1) determined that the Transaction, including the Offer and the Merger, are fair to, and in the best interests of, Emulex and its Shareholders, (2) approved and declared advisable the Merger Agreement and the Transaction, including the Offer and the Merger, and (3) recommended that the Shareholders accept the Offer, tender their Shares to Purchaser in the Offer and, to the extent applicable, approve and adopt the Merger Agreement and the Merger.

Thereafter on February 25, 2015, the parties executed the Merger Agreement and the Tender and Support Agreement and published a joint press release announcing the Transaction.

Reasons for the Recommendation

In approving the Merger Agreement and the transactions contemplated thereby and making its recommendation that Shareholders tender their Shares in the Offer, the Board considered a number of factors, including the following, which the Board believes support these determinations:

- *Emulex's Prospects as an Independent Company:* The Board concluded that the value that would be realized by Shareholders in the Offer and the Merger was greater than could reasonably be expected to be realized by Shareholders were Emulex to continue as an independent publicly traded company. In so doing, the Board considered Emulex's business, financial position, progress in executing on the three-part program to enhance shareholder value that Emulex publicly announced on November 11, 2013, results of operations and prospects, including management's forecasts of future results of operations, and weighed the possible opportunities and risks presented in respect of management's forecasts in connection with this analysis. The Board also considered, among other things, (1) the highly competitive nature of Emulex's business, (2) the rapidly changing nature of the business in which Emulex operates, (3) Emulex's size and the greater financial and other resources that certain of Emulex's competitors have, (4) Emulex's ability to compete for talent against larger or faster-growing technology companies, and (5) the potential impact of these factors on

Emulex's ability to execute its strategic plan and achieve its financial forecast.

- *Available Alternatives; Results of Discussions with Third Parties:* The Board considered possible alternatives to the acquisition by Avago, including the possibility of Emulex being acquired in whole or in part by another company or a private equity firm. In this regard, the Board also considered the results of the process that the Board had conducted, with the assistance of Emulex's management and Emulex's financial and legal advisors, to evaluate strategic alternatives in 2013 and 2014 and the results of the third-party outreach conducted in 2015, including discussions with third parties regarding possible business combination and change of control transactions as described above in "—Background of the Transaction" in this Item 4.
- *Premium to Market Price:* The Board considered that the Offer Price of $8.00 in cash per share represented:
  - a premium of 26.4% to the closing sales price on February 24, 2015, the last trading day prior to the execution of the Merger Agreement;
  - a premium of 24.0% based on the 30-day average of $6.45 per Share as of February 24, 2015;
  - a premium of 32.9% based on the 90-day average of $6.02 per Share as of February 24, 2015;

- a premium of 4.8% based on the 52-week high closing Share price of $7.63 per Share as of February 24, 2015;
- a premium of 79.4% based on the 52-week low closing Share price of $4.46 per Share as of February 24, 2015; and
- a premium of 33.3% based on the Institutional Brokers' Estimate System ("IBES") median price target of $6.00 per Share on February 24, 2015.

- *Financial Analyses and Goldman Sachs Fairness Opinion:* The Board considered the various financial analyses presented by Goldman Sachs, as well as the oral opinion of Goldman Sachs (which was subsequently confirmed in writing) to the effect that, as of February 25, 2015 and based upon and subject to the factors and assumptions set forth therein, the $8.00 in cash per Share to be paid to the holders (other than Avago and its affiliates) of Shares pursuant to the Merger Agreement was fair from a financial view to such holders (see "—Opinion of the Financial Advisor to the Emulex Board" below in this Item 4). The full text of Goldman Sachs' written opinion, dated February 25, 2015, is attached as Annex A to this Statement.
- *Cash Consideration; Certainty of Value:* The Board considered the form of consideration to be paid to the Shareholders in the Offer and the Merger and the certainty of the value of cash consideration compared to stock or other forms of consideration, as well as the fact that Avago's proposal was not subject to a financing

contingency. The Board considered the size and business reputation of Avago and its management, other acquisitions Avago had completed and Avago's substantial financial resources, which the Board believed supported the conclusion that a transaction with Avago could be reasonably expected to be completed.

- *Termination Right to Accept Superior Proposals:* The Board considered the fact that the Merger Agreement provides that, at any time prior to the Acceptance Time (as defined in the Merger Agreement), if the Board receives a Competing Proposal (as defined in the Merger Agreement) from a party that in the good faith determination of the Board, after consultation with its independent financial advisor and legal advisors, constitutes or would reasonably be expected to lead to a Superior Proposal (as defined in the Merger Agreement) and the Board determines in good faith, after consultation with its legal advisors, that failure to take such action would be reasonably likely to result in a breach of the directors' fiduciary duties under applicable law, the Board may terminate the Merger Agreement to concurrently enter into an agreement with respect to that Superior Proposal upon payment of a $19.5 million termination fee.
- *Change in Recommendation:* The Board considered the fact that, on the terms and subject to the conditions set forth in the Merger Agreement, the Board may withdraw or modify its recommendation in response to a Superior Proposal or in response to a material

development or change in circumstances (not in connection with a Competing Proposal) that was not known to the Board as of the date of the Merger Agreement if, in each case, it determines in good faith, after consultation with its legal advisors, that failure to take such action would be reasonably likely to result in a breach of the directors' fiduciary duties under applicable law.

- *Termination Fee:* The Board considered the fact that the Merger Agreement requires Emulex to pay a termination fee of $19.5 million (equal to approximately 3.2% of the aggregate equity value of the Transaction) if Emulex were to terminate the Merger Agreement to enter into an agreement with respect to a Superior Proposal. The Board was informed by counsel that the amount and structure of the termination fee was heavily negotiated with representatives of Avago and equated to approximately $0.26 per fully diluted Share. Based in part thereon, the Board determined that the termination fee amount would not likely preclude a third party from making a Superior Proposal if it desired to do so.
- *Closing Conditions:* The Board considered and assessed the closing conditions, including that the Offer was conditioned on the expiration or termination of the waiting period under the HSR Act, the absence of certain litigation initiated by governmental authorities, the continuing accuracy of Emulex's representations and warranties in the Merger Agreement (unless the inaccuracies,

individually or in the aggregate, would not have a Material Adverse Effect (as defined in the Merger Agreement)), compliance in all material respects with Emulex's covenants in the Merger Agreement and other conditions, including the Minimum Condition (as defined in the Merger Agreement), and concluded that there was a substantial probability that these conditions would be satisfied.

- *Extension of the Offer Period:* The Board considered the fact that the Merger Agreement provides that, until October 23, 2015, subject to certain limitations set forth in the Merger Agreement, Purchaser would be required to extend the Offer beyond the initial expiration of the Offer if certain conditions to the consummation of the Offer were not satisfied as of the initial expiration of the Offer or, if applicable, certain subsequent expirations, which would increase the likelihood that the Offer could be consummated.
- *Availability of Appraisal Rights:* The Board was informed that statutory appraisal rights under the DGCL would be available in connection with the Merger to Shareholders who do not tender their Shares in the Offer and who otherwise comply with the statutory requirements of the DGCL.

The Board also considered a number of risks and other countervailing considerations concerning the Merger Agreement, the Offer and the Transaction, including the following:

- *No Shareholder Participation in Potential Future Growth:* The Board considered the fact

that, following the Merger, Shareholders would have no continuing equity interest in Emulex's business and, as such, would not have the opportunity to participate in its potential future growth or profits following the Merger. In this regard, the Board took into account management's expectations for the current fiscal year, the forecast summarized in "Additional Information to be Furnished—Projected Financial Information" in Item 8 below, plans for seeking to improve Emulex's business and the opportunities and challenges facing Emulex.

- *Restrictions on Soliciting Competing Proposals; Break-up Fee:* The Board considered the fact that the Merger Agreement contains restrictions on Emulex soliciting competing acquisition proposals and requires the payment of a $19.5 million termination fee were Emulex to terminate the Merger Agreement to enter into an agreement with respect to a Superior Proposal, which would make it more costly for any other potential purchaser to acquire Emulex.
- *Representations, Warranties and Covenants in the Merger Agreement:* The Board considered the representations, warranties and covenants in the Merger Agreement, as well as the fact that Purchaser's obligation to purchase Shares tendered in the Offer would be subject to various conditions, including the accuracy of such representations and warranties (unless the inaccuracies individually or in the aggregate, would not have a Material Adverse

Effect (as defined in the Merger Agreement)) and Emulex's compliance in all material respects with such covenants.

- *Failure to Close:* The Board considered the risk that the Offer and Merger might not be completed and the effect of the resulting public announcement of termination of the Merger Agreement on:
  - The market price of the Shares, which could be affected by many factors, including (1) the reason for which the Merger Agreement was terminated and whether such termination results from factors adversely affecting Emulex, (2) the possibility of the marketplace would consider Emulex to be an unattractive acquisition candidate, and (3) the possible sale of Shares by short-term investors following an announcement of termination of the Merger Agreement;
  - Emulex's operating results, including in light of the costs incurred in connection with the Transaction;
  - Emulex's ability to attract and retain key personnel; and
  - Emulex's relationships with customers, suppliers, vendors, purchasing agents and other business partners.
- *Potential Negative Effects on Emulex:* The Board considered the fact that the announcement of the Offer and the Merger, and the demands on the time and energies of Emulex's management and employees in connection with the Offer and the Merger may

also disrupt Emulex's businesses, adversely affect customer relationships, impair Emulex's ability to attract or retain key personnel and distract Emulex personnel from focusing on Emulex's business.

- *Pre-Closing Covenants:* The Board considered that Emulex would be required to agree, subject to specified exceptions, that Emulex must obtain Avago's prior written consent (which consent shall not be unreasonably withheld, conditioned or delayed) for a number of actions that, if not taken, could limit the ability of Emulex to pursue or undertake business opportunities that could arise prior to the consummation of the Offer and the Merger.
- *Tax Effect:* The Board considered the fact that the cash to be received by the Shareholders in the Offer and the Merger would be taxable to the Shareholders.
- *Interests of Directors and Executive Officers:* The Board considered that Emulex's directors and executive officers may have interests in the Offer and the Merger or other transactions contemplated by the Merger Agreement that are different from, or in addition to, those of the Shareholders. See "—Arrangements with Current Executive Officers and Directors of Emulex" in Item 3 above.

The factors listed above as supporting the Board's decisions were determined by the Board to outweigh the countervailing considerations and risks. The foregoing discussion of the Board's reasons for its recommendation that the Shareholders accept the Offer is not meant to be exhaustive, but addresses the

material factors considered by the Board in connection with its recommendation. In view of the wide variety of factors considered by the Board in connection with its evaluation of the Offer and the complexity of these matters, the Board did not find it practicable to, and did not, quantify or otherwise assign relative weights to the specific factors considered in reaching its determination and recommendation. Rather, the Board made its determination and recommendation based on the totality of the information presented to it, and the judgments of individual members of the Board may have been influenced to a greater or lesser degree by different factors.

Opinion of the Financial Advisor to the Emulex Board

Goldman Sachs delivered its opinion to the Board that, as of February 25, 2015 and based upon and subject to the limitations and assumptions set forth therein, the $8.00 in cash per Share to be paid to the holders (other than Avago and its affiliates) of Shares pursuant to the Merger Agreement was fair from a financial point of view to such holders.

The full text of the written opinion of Goldman Sachs, dated February 25, 2015, which sets forth the assumptions made, procedures followed, matters considered and limitations on the review undertaken in connection with the opinion, is attached as Annex A to this Statement. Goldman Sachs provided its opinion for the information and assistance of the Board in connection with its consideration of the transactions contemplated by the Merger Agreement and such opinion does not

constitute a recommendation as whether or not to tender Shares in the Offer or any other matter.

In connection with rendering the opinion described above and performing its related financial analyses, Goldman Sachs reviewed, among other things:

- the Merger Agreement;
- annual reports to Shareholders and Annual Reports on Form 10-K of Emulex for the five fiscal years ended June 29, 2014;
- certain interim Quarterly Reports on Form 10-Q of Emulex;
- certain other communications from Emulex to Shareholders;
- certain publicly available research analyst reports for Emulex;
- certain internal financial analyses and forecasts for Emulex prepared by its management and approved for Goldman Sachs' use by Emulex (which we refer to as the "**Forecasts**").

Goldman Sachs also held discussions with members of the senior management of Emulex regarding their assessment of the past and current business operations, financial condition and future prospects of Emulex. In addition, Goldman Sachs reviewed the reported price and trading activity for the Shares; compared certain financial and stock market information for Emulex with similar information for certain other companies, the securities of which are publicly traded; reviewed the financial terms of certain recent business combinations in the semiconductor industry and in

other industries; and performed such other studies and analyses, and considered such other factors, as Goldman Sachs deemed appropriate.

For purposes of rendering the opinion described above, Goldman Sachs, with Emulex's consent, relied upon and assumed the accuracy and completeness of all of the financial, legal, regulatory, tax, accounting and other information provided to, discussed with or reviewed by, Goldman Sachs, without assuming any responsibility for independent verification thereof. In that regard, Goldman Sachs assumed with Emulex's consent that the Forecasts have been reasonably prepared on a basis reflecting the best currently available estimates and judgments of the management of Emulex. In addition, Goldman Sachs did not make an independent evaluation or appraisal of the assets and liabilities (including any contingent, derivative or other off-balance-sheet assets and liabilities) of Emulex or any of its subsidiaries, and Goldman Sachs was not furnished with any such evaluation or appraisal. Goldman Sachs assumed that all governmental, regulatory or other consents and approvals necessary for the consummation of the Transaction will be obtained without any adverse effect on Emulex or on the expected benefits of the Transaction in any way meaningful to Goldman Sachs' analysis. Goldman Sachs also assumed that the Transaction will be consummated on the terms set forth in the Merger Agreement, without the waiver or modification of any term or condition the effect of which would be in any way meaningful to Goldman Sachs' analysis.

Goldman Sachs' opinion did not address the underlying business decision of Emulex to engage in the Transaction, or the relative merits of the

Transaction as compared to any strategic alternatives that may be available to Emulex, nor does it address any legal, regulatory, tax or accounting matters. Goldman Sachs' opinion addresses only the fairness from a financial point of view to the holders (other than Avago and its affiliates) of Shares, as of the date of the opinion, of the $8.00 in cash per Share to be paid to such holders pursuant to the Merger Agreement. Goldman Sachs did not express any view on, and its opinion did not address, any other term or aspect of the Merger Agreement or the Transaction or any term or aspect of any other agreement or instrument contemplated by the Merger Agreement or entered into or amended in connection with the Transaction, including, the fairness of the Transaction to, or any consideration received in connection therewith by, the holders of any other class of securities, creditors or other constituencies of Emulex, nor as to the fairness of the amount or nature of any compensation to be paid or payable to any of the officers, directors or employees of Emulex, or class of such persons, in connection with the Transaction, whether relative to the $8.00 in cash per Share to be paid to the holders (other than Avago and its affiliates) of Shares pursuant to the Merger Agreement or otherwise. Goldman Sachs did not express any opinion as to the impact of the Transaction on the solvency or viability of Emulex or Avago or the ability of Emulex or Avago to pay their respective obligations when they come due. Goldman Sachs' opinion was necessarily based on economic, monetary, market and other conditions as in effect on, and the information made available to Goldman Sachs as of, the date of the opinion and Goldman Sachs assumes no responsibility for updating,

revising or reaffirming its opinion based on circumstances, developments or events occurring after the date of its opinion. Goldman Sachs' advisory services and opinion were provided for the information and assistance of the Board in connection with its consideration of the Transaction, and such opinion does not constitute a recommendation as to whether or not any holder of Shares should tender such Shares in connection with the Offer or how any holder of Shares should vote with respect to the Transaction or any other matter. Goldman Sachs' opinion was approved by a fairness committee of Goldman Sachs.

The following is a summary of the material financial analyses delivered by Goldman Sachs to the Board in connection with rendering the opinion described above. The following summary, however, does not purport to be a complete description of the financial analyses performed by Goldman Sachs, nor does the order of analyses described represent relative importance or weight given to those analyses by Goldman Sachs. Some of the summaries of the financial analyses include information presented in tabular format. The tables must be read together with the full text of each summary and are alone not a complete description of Goldman Sachs' financial analyses. Except as otherwise noted, the following quantitative information, to the extent that it is based on market data, is based on market data as it existed on or before February 24, 2015, the last trading day before Goldman Sachs delivered its financial analysis to the Board, and is not necessarily indicative of current market conditions.

Historical Stock Trading Analysis

Goldman Sachs analyzed the consideration to be paid to holders of Shares pursuant to the Merger Agreement in relation to the then-current Share price, the 30-day average Share price, the 90-day average Share price, the 52-week low closing Share price, the 52-week high closing Share price and the IBES median price target, in each case as of February 24, 2015 (the last trading day before Goldman Sachs delivered its financial analysis to the Board), in each case as a premium to the Share price.

This analysis indicated that the $8.00 in cash per Share to be paid to Emulex stockholders pursuant to the Merger Agreement represented:

- a premium of 26.4% based on the closing market price of $6.33 per Share on February 24, 2015;
- a premium of 24.0% based on the 30-day average of $6.45 per Share as of February 24, 2015;
- a premium of 32.9% based on the 90-day average of $6.02 per Share as of February 24, 2015;
- a premium of 4.8% based on the 52-week high closing Share price of $7.63 per Share as of February 24, 2015;
- a premium of 79.4% based on the 52-week low closing Share price of $4.46 per Share as of February 24, 2015; and
- a premium of 33.3% based on the IBES median price target of $6.00 per Share on February 24, 2015.

Selected Companies Analysis

Goldman Sachs reviewed and compared certain financial information, ratios and public market multiples for Emulex to corresponding financial information, ratios and public market multiples for the following publicly traded corporations in the networking and storage sector of the semiconductor industry (which we refer to collectively as the "**Selected Companies**"):

- Avago Technologies ("**AVGO**")
- Brocade Communications Systems ("**BRCD**")
- Marvell Technology Group ("**MRVL**")
- Mellanox Technologies ("**MLNX**")
- PMC-Sierra ("**PMCS**")
- QLogic Corporation ("**QLogic**" or "**QLGC**")

Although none of the Selected Companies is directly comparable to Emulex, the companies included were chosen because they are publicly traded companies with operations that, for purposes of analysis, may be considered similar to certain operations of Emulex.

The multiples and ratios of the Selected Companies were based on the closing prices of their respective common shares on February 24, 2015, information obtained from SEC filings, CapitalIQ and other market research, and estimates from IBES. The multiples and ratios for Emulex were based on the Forecasts, the closing price of the Shares on February 24, 2015, information obtained from SEC filings, CapitalIQ and other market research, and estimates from IBES.

With respect to each of the Selected Companies and Emulex, Goldman Sachs calculated, among other things:

- percentage revenue growth estimated for fiscal years 2015 to 2016 (calendarized to June to conform to fiscal period);
- percentage earnings per share ("**EPS**") growth estimated for fiscal years 2015 to 2016 (calendarized to June to conform to fiscal period);
- percentage earnings before interest and tax ("**EBIT**") margin estimated for fiscal year 2015 (calendarized to June to conform to fiscal period);
- price as a multiple of estimated fiscal year 2015 EPS ("**P/E**") (calendarized to June to conform to fiscal period);
- cash-adjusted price as a multiple of estimated fiscal year 2015 cash-adjusted EPS ("**Cash-Adjusted P/E**") (calendarized to June to conform to fiscal period), with cash-adjusted price calculated by subtracting excess cash per share from unadjusted price per share and cash-adjusted EPS calculated by subtracting tax-adjusted interest income earned on excess cash per share from unadjusted EPS. Excess cash is defined as the cash in excess of existing debt, and all calculations assume a 0.5% interest income on excess cash and a 10% tax rate for Emulex and 35% tax rate for the Selected Companies; and

- enterprise value ("**EV**") as a multiple of fiscal year 2015 EBIT (calendarized to June to conform to fiscal period).

The results of these analyses are summarized as follows:

	Emulex (Management)	Emulex (Market Analysts)	Selected Companies Range High	Low	Median
FY'15 – '16 Revenue Growth	(5.0%)	(0.7%)	18.6%	0.5%	6.5%
FY'15 – '16 EPS Growth	(14.0%)	(12.5%)	31.6%	(4.2)%	11.6%
FY'15 EBIT Margin	13.2%	13.1%	38.2%	15.3%	18.5%
FY'15 P/E	9.6x	9.9x	27.9x	13.3x	15.9x
FY'15 Cash-Adj. P/E	9.6x	9.9x	23.6x	10.5x	15.2x
FY'15 EV/EBIT	8.5x	8.7x	22.2x	9.5x	13.9x

Illustrative Present Value of Future Share Price Analysis

Goldman Sachs performed an illustrative analysis of the implied present value of the future price per Share, using the Forecasts for each of the fiscal years 2016 through 2018. This analysis is designed to provide an indication of the implied present value of a theoretical future value of a company's equity on a per share basis as a function of such company's estimated future earnings and its assumed future price/earnings multiples. Goldman Sachs first calculated the implied values per Share as of the end of the fiscal years 2015 through 2017, by applying illustrative price to one-year forward EPS multiples of 9.0x to 12.0x to EPS estimates for each of the fiscal years 2016 through 2018, and then discounting these theoretical future values of Emulex's equity on a per Share basis to present values to December 28, 2014, using an illustrative discount rate of 13.9% reflecting estimates of Emulex's cost of equity and taking into account a size premium adjustment of 2.7% (representing the empirically observed excess historical market returns compared to the return predicted by the Capital Asset Pricing Model (CAPM) for companies of Emulex's size). This analysis resulted in a range of illustrative implied present values of $4.65 to $6.89 per Share.

Goldman Sachs then applied a cash-adjusted price/earnings multiples methodology to conduct a similar analysis. Goldman Sachs calculated the implied values per Share as of the end of the fiscal years 2015 through 2017, by applying illustrative price to one-year forward cash-adjusted EPS multiples of 8.0x to 11.0x to cash-adjusted EPS

estimates for each of the fiscal years 2016 through 2018 and adding the applicable excess cash per Share estimates from the Forecasts, and then discounting these theoretical future values of Emulex's equity on a per Share basis to present values to December 28, 2014 (as discussed above). Cash-adjusted EPS and excess cash calculations are as described in the section entitled "Selected Companies Analysis." This analysis resulted in a range of illustrative implied present values of $4.55 to $6.76 per Share.

Illustrative Discounted Cash Flow Analysis

Goldman Sachs performed an illustrative discounted cash flow analysis on Emulex using the Forecasts to determine a range of illustrative present values per Share. Goldman Sachs calculated indications of present value of unlevered free cash flow values for Emulex for the second half of fiscal year ending 2015 through fiscal year 2019 using illustrative discount rates ranging from 11.0% to 13.0%, reflecting estimates of Emulex's weighted average cost of capital. Goldman Sachs calculated the present value of unlevered free cash flows for Emulex in the terminal year using illustrative perpetuity growth rates ranging from 2.0% to 4.0% and illustrative discount rates ranging from 11.0% to 13.0%. Goldman Sachs then added the present value of the illustrative terminal value with the present values of the unlevered free cash flows for each of the second half of fiscal year ending 2015 through fiscal year 2019 and subtracted the assumed amount of Emulex's net debt as of December 28, 2014 (based on public filings) to calculate a range of illustrative equity values for Emulex. Goldman Sachs then divided this range of illustrative equity values by the

number of Emulex's fully diluted shares of Common Stock (calculated based on public filings and guidance of Emulex's management with respect to future equity issuances) to derive a range of illustrative present values per Share of $4.89 to $7.30.

General

The preparation of a fairness opinion is a complex process and is not necessarily susceptible to partial analysis or summary description. Selecting portions of the analyses or of the summary set forth above, without considering the analyses as a whole, could create an incomplete view of the processes underlying Goldman Sachs' opinion. In arriving at its fairness determination, Goldman Sachs considered the results of all of its analyses and did not attribute any particular weight to any factor or analysis considered by it. Rather, Goldman Sachs made its determination as to fairness on the basis of its experience and professional judgment after considering the results of all of its analyses. No company used in the above analyses is directly comparable to Emulex or the Transaction.

Goldman Sachs prepared these analyses for purposes of Goldman Sachs providing its opinion to the Board as to the fairness from a financial point of view to the holders (other than Avago and its affiliates) of Shares of the $8.00 in cash per Share to be paid to such holders pursuant to the Merger Agreement. These analyses do not purport to be appraisals nor do they necessarily reflect the prices at which businesses or securities actually may be sold. Analyses based upon forecasts of future results are not necessarily indicative of actual future results, which may be significantly more or less favorable

than suggested by these analyses. Because these analyses are inherently subject to uncertainty, being based upon numerous factors or events beyond the control of the parties or their respective advisors, none of Emulex, Avago, Goldman Sachs or any other person assumes responsibility if future results are materially different from those forecast.

The $8.00 in cash per Share to be paid pursuant to the Merger Agreement was determined through arm's-length negotiations between Emulex and Avago and was approved by the Board. Goldman Sachs provided advice to Emulex during these negotiations. Goldman Sachs did not, however, recommend any specific amount of consideration to Emulex or the Board or that any specific amount of consideration constituted the only appropriate consideration for the Transaction.

As described above, Goldman Sachs' opinion to the Board was one of many factors taken into consideration by Board in making its determination to approve the Merger Agreement and recommend that Emulex's Shareholders tender their Shares in the Offer. The foregoing summary does not purport to be a complete description of the analyses performed by Goldman Sachs in connection with its opinion and is qualified in its entirety by reference to the full text of the written opinion of Goldman Sachs included as Annex A to this Statement.

Goldman Sachs and its affiliates are engaged in advisory, underwriting and financing, principal investing, sales and trading, research, investment management and other financial and non-financial activities and services for various persons and entities. Goldman Sachs and its affiliates and employees, and funds or other entities they manage

or in which they invest or have other economic interests or with which they co-invest, may at any time purchase, sell, hold or vote long or short positions and investments in securities, derivatives, loans, commodities, currencies, credit default swaps and other financial instruments of Emulex, Avago, any of their respective affiliates and third parties, or any currency or commodity that may be involved in the Transaction. Goldman Sachs acted as financial advisor to Emulex in connection with, and participated in certain of the negotiations leading to, the Transaction. Goldman Sachs has provided certain financial advisory and/or underwriting services to Emulex and/or its affiliates from time to time for which the Investment Banking Division of Goldman Sachs has received, and may receive compensation, including having acted as sole bookrunning manager with respect to an offering of the Notes in November 2013. During the two year period ended February 25, 2015, the Investment Banking Division of Goldman Sachs has received compensation for financial advisory and underwriting services provided to Emulex and/or its affiliates of approximately $4.5 million. Goldman Sachs may also in the future provide financial advising and/or underwriting services to Emulex, Avago and their respective affiliates for which the Investment Banking Division of Goldman Sachs may receive compensation.

The Board selected Goldman Sachs as its financial advisor because it is an internationally recognized investment banking firm that has substantial experience in transactions similar to the Transaction. Pursuant to a letter agreement dated January 29, 2015, Emulex engaged Goldman Sachs to act as its financial advisor in connection with a possible merger

or business combination involving Emulex or a sale of all or a portion of Emulex. The engagement letter between Emulex and Goldman Sachs provides for a transaction fee that is estimated, based on the information available as of the date of announcement of the Merger Agreement, at approximately $11.0 million, 75% of which is contingent upon consummation of the Transaction. In addition, Emulex has agreed to reimburse Goldman Sachs for certain of its expenses, including attorneys' fees and disbursements, and to indemnify Goldman Sachs and related persons against various liabilities, including certain liabilities under the federal securities laws.

Intent to Tender

Simultaneously with the execution of the Merger Agreement, certain of Emulex's directors and executive officers executed the Tender and Support Agreement pursuant to which they have, among other matters, agreed to (1) tender the Shares owned by them in the Offer and (2) support the Merger and the Transaction, each on the terms and subject to the conditions set forth in the Tender and Support Agreement attached as Exhibit (e)(2) to this Statement. For a discussion regarding the decision of the Board with respect to the Merger Agreement and the Transaction, including the Offer and the Merger, see "—Reasons for the Recommendation" in this Item 4 above.

Item 5. Persons/Assets, Retained, Employed, Compensated or Used

See "—Opinion of the Financial Advisor to the Emulex Board" in Item 4 above for a description of Emulex's engagement of Goldman Sachs, which is incorporated by reference herein.

Except as set forth above, neither Emulex nor any person acting on its behalf has or currently intends to employ, retain or compensate any person to make solicitations or recommendations to the Shareholders on its behalf in connection with the Offer.

Item 6. Interest in Securities of the Subject Company

No transactions in Shares have been effected during the past 60 days by Emulex or, to the knowledge of Emulex, any current executive officer, director, affiliate or subsidiary of Emulex, or the trustee of the Emulex ESPP, except that Mr. Benck sold 12,000 Shares at a price per Share of $6.3453 on February 4, 2015 pursuant to a Rule 10b5-1 trading plan that Mr. Benck established in November 2014.

Item 7. Purposes of the Transaction and Plans or Proposals

Except as indicated in this Statement or the Exhibits hereto, no negotiations are currently being undertaken or are currently underway by Emulex in response to the Offer that relate to, or would result in, (1) a tender offer or other acquisition of Emulex's securities by Emulex, any subsidiary of Emulex or any other person, (2) any extraordinary transaction, such as a merger, reorganization or liquidation, involving Emulex or any subsidiary of Emulex, (3) any purchase, sale or transfer of a material amount of assets by Emulex or any subsidiary of Emulex, or (4) any material change in the present dividend rate or policy, or indebtedness or capitalization of Emulex.

Except as indicated in this Statement or the Exhibits hereto, there currently are no transactions, resolutions of the Board, agreements in principle or

signed contracts in response to the Offer that relate to or would result in one or more of the matters referred to in this Item 7.

Item 8. Additional Information

Golden Parachute Compensation

The information required by Item 402(t) of SEC Regulation S-K regarding the compensation for each of the named executive officers of Emulex that is either based on or otherwise relates to the Offer and the Merger is described below. This compensation is referred to as "golden parachute compensation" by the applicable SEC executive compensation disclosure rules. If the Offer and the Merger are completed in accordance with the terms of the Merger Agreement, the consummation of the Offer and the Merger will constitute a "change in control" under the terms of the Key Employee Retention Agreement and the CIC Plan (as described above under Item 3) and each named executive officer will or may become entitled to receive certain payments and benefits. The amounts shown reflect only the additional payments or benefits that the individual would have received upon the occurrence of the triggering event listed below; they do not include the value of payments or benefits that would have been earned, or any amounts associated with equity awards that would vest pursuant to their terms on or prior to the closing of the Offer and the Merger, absent the triggering event.

The table below assumes that the closing of the Offer and the Merger occurred on April 3, 2015, the last practicable date prior to the filing of this Statement, and the employment of each named executive officer of Emulex ceases as a result of termination by Emulex without cause or termination

by the applicable named executive officer for good reason on that date. The amounts set forth in the table are estimates based on multiple assumptions that may or may not actually occur, including the assumptions described in this Statement. Some of these assumptions are based on information currently available and, as a result, the actual amounts, if any, that may be received by a named executive officer may differ in material respects from the amounts set forth. In addition, the amounts set forth in the table do not take into account any reduction in payment of benefits that may be imposed with respect to any so-called "golden parachute payments" under Section 280G of the Code. None of the named executive officers are entitled to a "gross-up" payment with respect to any such "golden parachute payment."

Name	Cash ($)[1][5]	Equity ($)[1][6]	Perquisites /Benefits ($)[1][7]	Total ($)[1][8]
Jeffrey W. Benck	2,310,000	4,013,283	51,661	6,374,944
Kyle B. Wescoat	560,000	1,127,250	39,072	1,726,322
Perry M. Mulligan	480,000	1,033,286	27,776	1,541,062
Jeffery L. Hoogenboom	579,219	1,366,505	39,072	1,984,796
Margaret A. Evashenk[2]	—	—	—	—
James M. McCluney[3]	—	—	—	—
Michael J. Rockenbach[4]	—	—	—	—

(1) No amounts are payable solely as a result of the Merger, and these amounts would be payable only if a "double-trigger" occurred (which would require a termination of the applicable individual's employment) within 24 months following the consummation of the Merger.

(2) Ms. Evashenk's employment with Emulex terminated on December 31, 2014.

(3) Mr. McCluney's employment with Emulex terminated on February 6, 2014.

(4) Mr. Rockenbach's employment with Emulex terminated on January 3, 2014.

(5) The amounts in this column represent the cash severance payments to which the executive officers would be entitled under the Key Employee Retention Agreement or the CIC Plan, as applicable, including a lump sum cash severance payment equal to 12 months of base pay (24 months for Mr. Benck), inclusive of their target incentive payment level with respect to the fiscal year prior to their termination date, in the event of a termination of his employment by Emulex without cause, or by him for good reason (each as defined in the Key Employee Retention Agreement or CIC Plan, as applicable) during the period beginning on the date of the Merger Agreement and ending 24 months after the effective date of a change in control of Emulex (the "**Change of Control Period**"). The following table breaks down the amounts in this column by type of payment.

	Base Salary ($)	Target Incentive Payment Level ($)	Total ($)
Jeffrey W. Benck	1,100,000	1,210,000	2,310,000
Kyle B. Wescoat	350,000	210,000	560,000
Perry M. Mulligan	320,000	160,000	480,000
Jeffery L. Hoogenboom	340,717	238,502	579,219
Margaret A. Evashenk	—	—	—
James M. McCluney	—	—	—
Michael J. Rockenbach	—	—	—

(6) The amounts in this column represent the value of the unvested Emulex Options, Emulex RSU Awards and Emulex Stock Awards under the Company Stock Plans the vesting of which would accelerate on a "double-trigger" basis in the event of a termination of his employment by the Emulex without cause, or by him for good reason (each as defined in the Key Employee Retention Agreement or CIC Plan, as applicable) during the Change of Control Period. For purposes of the table above, amounts are calculated based on the number of awards held by each named executive officer as of

April 3, 2015 and the per share equity award consideration is assumed to be the Offer Price. The following table breaks down the amounts in this column by type of equity award.

	Emulex Options ($)	Shares Subject to Emulex RSU Awards ($)	Emulex Stock Awards ($)	Total ($)
Jeffrey W. Benck	$560,107	$940,752	$2,512,424	$4,013,283
Kyle B. Wescoat	$140,674	$690,176	$ 296,400	$1,127,250
Perry M. Mulligan	$127,014	$629,472	$ 276,800	$1,033,286
Jeffery L. Hoogenboom	$172,545	$688,360	$ 505,600	$1,366,505
Margaret A. Evashenk	—	—	—	
James M. McCluney	—	—	—	
Michael J. Rockenbach	—	—	—	

The value of the unvested and accelerated Emulex Options is the difference between the value of the Offer Price and the exercise price of the Emulex Option, multiplied by the number of unvested shares as of April 3, 2015 consistent with the methodology applied under SEC Regulation M-A Item 1011(b) and Regulation S-K Item 402(t)(2). The amounts in this column for the unvested and accelerated Emulex Options (i) disregard Emulex Options that have an exercise price greater than the Offer Price per share, (ii) do not represent either the value of the Assumed Options for accounting purposes nor the amount, if any, that will actually be realized by the individual upon future exercise or other disposition of the Assumed Options, and (iii) do not reflect any taxes payable by the option holders. See the discussions relating to the treatment of stock options and the treatment of restricted stock units in the section entitled See Item 3, "—Past Contacts, Transactions, Negotiations and Agreements—Agreements with Current Executive Officers and Directors of Emulex" for further information relating to the amounts by type of award.

(7) The amounts in this column represent the value of 12 months of COBRA coverage (health, dental and vision benefits) for each executive officer and his spouse and dependents (24 months for Mr. Benck), as well as reimbursement of up to $15,000 for outplacement services utilized within the first 12 months following termination of employment, that each executive officer would be entitled to in the event of a termination of his employment by the Emulex without cause, or by him for good reason

(each as defined in the Key Employee Retention Agreement or CIC Plan, as applicable) during the Change of Control Period.

(8) The amounts in this column include the aggregate dollar value of the sum of all amounts reported in the preceding columns.

None of the executive officers is entitled to a tax gross-up payment to reimburse the executive for the effect of any federal excise tax levied on "excess parachute payments" within the meaning of Section 280G of the Code. In addition, under the Key Employee Retention Agreement and the CIC Plan, any payments and benefits to the executive officers that constitute "parachute payments" under Sections 280G and 4999 of the Code may be subject to reduction to the maximum amount that would not trigger any excise taxes if such reduction would result in a greater net-after-tax amount to such executive officers. For purposes of the tables above, Emulex assumed that no such reduction would be made to the payments to the executive officers.

Other Material Information

Antitrust Compliance

Under the HSR Act, the acquisition of Shares pursuant to the Offer may be completed following the expiration of a 15-day waiting period following the filing by Avago of its Premerger Notification and Report Form with respect to the Offer, unless Avago receives a request for additional information and documentary material from the Antitrust Division of the Department of Justice (the "**Antitrust Division**") or the Federal Trade Commission (the "**FTC**") or unless early termination of the waiting period is granted. If, within the 15-day waiting period, either the Antitrust Division or the FTC requests additional information or documentary material concerning the Offer, the waiting period will be extended through the 10th day after the date of substantial compliance by Avago. Complying with a request for additional information and documentary material may take a

significant amount of time. At any time before or after Purchaser's acquisition of Shares pursuant to the Offer, the Antitrust Division or the FTC could take such action under the antitrust laws of the United States as it deems necessary or desirable in the public interest, including seeking to enjoin the purchase of Shares pursuant to the Offer or seeking divestiture of the Shares so acquired or divestiture of substantial assets of Avago or Emulex or their respective subsidiaries. State attorneys general may also bring legal action under both state and federal antitrust laws, as applicable. Private parties (including individual States of the United States) may also bring legal actions under the antitrust laws of the United States under certain circumstances. Emulex does not believe that the consummation of the Offer will result in a violation of any applicable antitrust laws. However, there can be no assurance that a challenge to the Offer on antitrust grounds will not be made, or if such a challenge is made, what the result would be.

On March 11, 2015, Avago's Parent and Emulex filed a Premerger Notification and Report Form ("**HSR Notice**") with the FTC and the Antitrust Division for review in connection with the Offer. Avago's Parent voluntarily withdrew its HSR Notice, effective as of March 26, 2015. Avago's Parent re-filed its HSR Notice on March 30, 2015 in order to provide the FTC and the Antitrust Division with additional time to review the Transaction. Based on the March 30th filing, the waiting period applicable to the purchase of Shares pursuant to the Offer will expire at 11:59 p.m. (New York time) on April 14, 2015, unless Avago's Parent withdraws and again re-files its HSR Notice or the waiting period is terminated or

extended by a request for additional information and documentary material from the FTC or the Antitrust Division prior to that time.

Appraisal Rights

Holders of Shares will not have appraisal rights in connection with the Offer. However, if the Merger is consummated (and regardless of whether the Merger is effected pursuant to Section 253 or Section 251(h) of the DGCL), Section 262 of the DGCL provides that any holder of Shares outstanding as of immediately prior to the Effective Time who has not tendered such Shares in the Offer and does not wish to accept the Offer Price for each Share pursuant to the Merger (a "**Remaining Shareholder**") and who has followed the procedures set forth in Section 262 of the DGCL will be entitled to demand appraisal of such Shares (all such Shares, collectively, the "**Dissenting Shares**") in accordance and subject to full compliance with applicable procedures under the DGCL.

In addition, if, after the consummation of the Offer, Purchaser and any other subsidiary of Avago hold at least 90% of the issued and outstanding Shares (the "**Short-Form Threshold**"), Purchaser intends to effect a merger under the short-form merger provisions of Section 253 of the DGCL without a meeting of the Shareholders. If Purchaser consummates the Offer but does not reach the Short-Form Threshold, then as promptly as practicable following the consummation of the Offer, Purchaser and Emulex have agreed to take all necessary and appropriate actions to cause the Merger to become effective as promptly as practicable following the consummation of the Offer, without a meeting of Shareholders, in accordance with Section 251(h) of

the DGCL. If the Merger is consummated, Shareholders who did not tender their Shares into the Offer will receive the Offer Price, without interest, subject to any withholding of taxes required by applicable law, except as provided in the Merger Agreement with respect to (1) Shares owned by Emulex or Avago or its subsidiaries or (2) Shares that are held by any Shareholder who is entitled to demand and properly has demanded appraisal for such Shares in accordance with Section 262 of the DGCL (as described below). Therefore, if the Merger takes place and a Shareholder does not demand appraisal of his, her or its Shares, the only difference to the Shareholder between tendering his, her or its Shares into the Offer and not tendering his, her or its Shares into the Offer would be that, if the Shareholder tenders his, her or its Shares, the Shareholder may be paid earlier.

The following discussion is not a complete statement of the law pertaining to appraisal rights under the DGCL and is qualified in its entirety by the full text of Section 262 of the DGCL, which is attached to this Statement as Annex B. All references in Section 262 of the DGCL to a "stockholder" and in this summary to "a Shareholder" are to the record holder of Shares immediately prior to the Effective Time as to which appraisal rights are asserted. A person having a beneficial interest in Shares held of record in the name of another person, such as a broker or nominee, must act promptly to cause the record holder to follow the steps summarized below properly and in a timely manner to perfect appraisal rights.

Under the DGCL, if the Merger is completed, holders of Shares immediately prior to the Effective Time who (1) did not tender their Shares in the Offer, (2) follow the procedures set forth in Section 262 of the DGCL, and (3) do not thereafter withdraw their demand for appraisal of such shares or otherwise lose their appraisal rights, in each case in accordance with the DGCL, will be entitled to have their Shares appraised by the Delaware Court of Chancery and to receive payment of the "fair value" of such shares, exclusive of any element of value arising from the accomplishment or expectation of the Merger, together with interest, if any, to be paid upon the amount determined to be fair value, as determined by such court. The "fair value" could be greater than, less than or the same as the Offer Price or the consideration payable in the Merger (which is equivalent in amount to the Offer Price).

This Statement constitutes the formal notice of appraisal rights under Section 262 of the DGCL. Under the DGCL, no additional notice is required to be provided to Shareholders prior to the Effective Time and Emulex, Avago and Purchaser do not intend to provide, prior to the Effective Time, any additional notice describing appraisal rights. Any Shareholder who wishes to exercise such appraisal rights or who wishes to preserve his, her or its right to do so, should review the following discussion and Section 262 of the DGCL carefully because failure to timely and properly comply with the procedures specified will result in the loss of appraisal rights under the DGCL. Within ten calendar days following the Effective Time, Emulex will provide notice of the effective date of the Merger to each Shareholder who is entitled to appraisal rights and who has demanded

appraisal of such holder's Shares in accordance with Section 262 of the DGCL within the later of the consummation of the Offer and April 27, 2015.

Any Shareholder wishing to exercise appraisal rights is urged to consult legal counsel before attempting to exercise such rights.

If a Shareholder elects to exercise appraisal rights under Section 262 of the DGCL, such Shareholder must do all of the following:

- within the later of the consummation of the Offer (which occurs when Purchaser has accepted for payment, and thereby purchases, the tendered Shares following the Expiration Date) and April 27, 2015, deliver to Emulex at the address indicated below a written demand for appraisal of Shares held, which demand must reasonably inform Emulex of the identity of the Shareholder, that the Shareholder is demanding appraisal;
- not tender their Shares in the Offer; and
- continuously hold of record the Shares from the date on which the written demand for appraisal is made through the Effective Time.

Written Demand by the Record Holder: All written demands for appraisal should be addressed to Emulex Corporation, 3333 Susan Street, Costa Mesa, California 92626, Attention: Corporate Secretary. The written demand for appraisal must be executed by or for the record holder of Shares, fully and correctly, as such holder's name appears on the certificate(s) for the Shares owned by such holder and must state that such holder intends thereby to demand appraisal of such holder's Shares. If the Shares are owned of record in a fiduciary capacity,

such as by a trustee, guardian or custodian, execution of the demand must be made in that capacity, and if the Shares are owned of record by more than one person, such as in a joint tenancy or tenancy in common, the demand must be executed by or for all joint owners. An authorized agent, including one of two or more joint owners, may execute the demand for appraisal for a holder of record. However, the agent must identify the record owner(s) and expressly disclose the fact that, in executing the demand, the agent is acting as agent for the record owner(s).

A beneficial owner of Shares held in "street name" who wishes to exercise appraisal rights should take such actions as may be necessary to ensure that a timely and proper demand for appraisal is made by the record holder of the Shares. If Shares are held through a broker, dealer, commercial bank, trust company or other nominee who in turn holds the Shares through a central securities depository nominee, such as Cede & Co., a demand for appraisal of such Shares must be made by or on behalf of the depository nominee, and must identify the depository nominee as the record holder. Any beneficial owner who wishes to exercise appraisal rights and holds Shares through a nominee holder is responsible for ensuring that the demand for appraisal is timely made by the record holder. The beneficial holder of the Shares should instruct the nominee holder that the demand for appraisal should be made by the record holder of the Shares, which may be a central securities depository nominee if the Shares have been so deposited.

A record holder, such as a broker, dealer, commercial bank, trust company or other nominee, who holds Shares as a nominee for several beneficial

owners may exercise appraisal rights with respect to the Shares held for one or more beneficial owners while not exercising such rights with respect to the Shares held for other beneficial owners. In such case, the written demand must set forth the number of Shares covered by the demand. Where the number of Shares is not expressly stated, the demand will be presumed to cover all Shares held in the name of the record owner.

Filing a Petition for Appraisal: Within 120 calendar days after the Effective Time, but not thereafter, the Surviving Corporation, or any holder of Shares who has complied with Section 262 of the DGCL and is entitled to appraisal rights under Section 262 may commence an appraisal proceeding by filing a petition in the Delaware Court of Chancery demanding a determination of the fair value of the Shares held by all holders who did not tender in the Offer and demanded appraisal. Notwithstanding the foregoing, at any time within 60 calendar days after the Effective Time, any holder who has not commenced an appraisal proceeding may withdraw such holder's demand for appraisal and accept the Merger Consideration (as defined in the Offer to Purchase). Any such attempt to withdraw made more than 60 calendar days after the Effective Time will require the written approval of the Surviving Corporation. Once a petition for appraisal is filed, the appraisal proceeding may not be dismissed as to any holder absent court approval, except that the foregoing does not affect the right of any holder who has not commenced an appraisal proceeding or joined that proceeding as a named party to withdraw such holder's demand for appraisal and to accept the Merger Consideration within 60 calendar days after

the Effective Time. If no such petition is filed within that 120-day period, appraisal rights will be lost for all Shareholders who had previously demanded appraisal of their Shares. Emulex is under no obligation to, and Purchaser and Avago have no present intention to cause it to, file a petition and holders should not assume that Emulex will file a petition or that it will initiate any negotiations with respect to the fair value of the Shares. Accordingly, it is the obligation of the holders of Shares to initiate all necessary action to perfect their appraisal rights in respect of the Shares within the period prescribed in Section 262 of the DGCL.

Within 120 calendar days after the Effective Time, any Shareholder who has complied with the requirements for exercise of appraisal rights will be entitled, upon written request, to receive from the Surviving Corporation a statement setting forth the aggregate number of Shares not tendered into the Offer and with respect to which demands for appraisal have been received and the aggregate number of holders of such Shares. Such statement must be mailed within 10 calendar days after a written request therefor has been received by the Surviving Corporation or within 10 calendar days after the expiration of the period for delivery of demands for appraisal, whichever is later. Notwithstanding the foregoing requirement that a demand for appraisal must be made by or on behalf of the record owner of the Shares, a person who is the beneficial owner of Shares held either in a voting trust or by a nominee on behalf of such person, and as to which demand has been properly made and not effectively withdrawn, may, in such pers[illegible]'s own name, file a petition for appraisal or request from the

Surviving Corporation the statement described in this paragraph.

Upon the filing of such petition by any such Shareholder, service of a copy thereof must be made upon the Surviving Corporation, which will then be obligated within 20 calendar days after such service to file with the Delaware Register in Chancery a duly verified list (the "**Verified List**") containing the names and addresses of all Shareholders who have demanded payment for their Shares and with whom agreements as to the value of their Shares has not been reached. Upon the filing of any such petition, the Delaware Court of Chancery may order that notice of the time and place fixed for the hearing on the petition be mailed to the Surviving Corporation and all of the Shareholders shown on the Verified List. Such notice will also be published at least one week before the day of the hearing in a newspaper of general circulation published in the City of Wilmington, Delaware, or in another publication determined by the Delaware Court of Chancery. The costs of these notices are borne by the Surviving Corporation.

After notice to the Shareholders as required by the Delaware Court of Chancery, the Court of Chancery is empowered to conduct a hearing on the petition to determine those Shareholders who have complied with Section 262 of the DGCL and who have become entitled to appraisal rights thereunder. The Court of Chancery may require the Shareholders who demanded payment for their Shares to submit their stock certificates to the Delaware Register in Chancery for notation thereon of the pendency of the appraisal proceeding and, if any Shareholder fails to

comply with the direction, the Court of Chancery may dismiss the proceedings as to that Shareholder.

Determination of Fair Value: After the Delaware Court of Chancery determines which Shareholders are entitled to appraisal, the appraisal proceeding will be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing appraisal proceedings. Through such proceeding, the Court of Chancery will determine the fair value of the Shares, exclusive of any element of value arising from the accomplishment or expectation of the Merger, together with interest, if any, to be paid upon the amount determined to be the fair value. Unless the Court of Chancery in its discretion determines otherwise for good cause shown, interest from the Effective Time through the date of payment of the judgment will be compounded quarterly and will accrue at 5% over the Federal Reserve discount rate (including any surcharge) as established from time to time during the period between the Effective Time and the date of payment of the judgment.

In determining fair value, the Delaware Court of Chancery will take into account all relevant factors. In *Weinberger v. UOP, Inc.*, the Delaware Supreme Court discussed the factors that could be considered in determining fair value in an appraisal proceeding, stating that "proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court" should be considered, and that "fair price obviously requires consideration of all relevant factors involving the value of a company." The Delaware Supreme Court stated that, in making this determination of fair value, the Delaware Court of Chancery must consider market value, asset value,

dividends, earnings prospects, the nature of the enterprise and any other facts that could be ascertained as of the date of the merger that throw any light on future prospects of the merged corporation. Section 262 of the DGCL provides that fair value is to be "exclusive of any element of value arising from the accomplishment or expectation of the merger." In *Cede & Co. v. Technicolor, Inc.*, the Delaware Supreme Court stated that such exclusion is a "narrow exclusion that does not encompass known elements of value," but which rather applies only to the speculative elements of value arising from such accomplishment or expectation. In *Weinberger*, the Supreme Court of Delaware also stated that "elements of future value, including the nature of the enterprise, which are known or susceptible of proof as of the date of the merger and not the product of speculation, may be considered."

Shareholders considering appraisal should be aware that the fair value of their Shares as so determined could be more than, the same as or less than the Offer Price or the consideration payable in the Merger (which is for each Share an amount in cash equal to the Offer Price, without interest, less any applicable withholding taxes). No representation is made as to the outcome of the appraisal of fair value as determined by the Delaware Court of Chancery, and Shareholders should recognize that such an appraisal could result in a determination of a value higher or lower than, or the same as, the Offer Price or the consideration payable in the Merger (which is for each Share an amount in cash equal to the Offer Price, without interest, less any applicable withholding taxes). On behalf of the Surviving Corporation, Purchaser reserves the right to assert,

in any appraisal proceeding, that for purposes of Section 262 of the DGCL, the fair value of a Share is less than the Offer Price or the consideration payable in the Merger (which is for each Share an amount in cash equal to the Offer Price, without interest, less any applicable withholding taxes).

Upon application by the Surviving Corporation or by any holder of Shares entitled to participate in the appraisal proceeding, the Delaware Court of Chancery may, in its discretion, proceed to trial upon the appraisal prior to the final determination of the Shareholders entitled to an appraisal. Any holder of Shares whose name appears on the Verified List and who, if required, has submitted such holder's certificates of stock to the Delaware Register in Chancery may participate fully in all proceedings until it is finally determined that such holder is not entitled to appraisal rights. The Court of Chancery will direct the payment of the fair value of the Shares, together with interest, if any, by the Surviving Corporation to the Shareholders entitled thereto. Payment will be so made to each such Shareholder upon the surrender to the Surviving Corporation of such Shareholder's certificates. The Court of Chancery's decree may be enforced as other decrees in such court may be enforced.

If a petition for appraisal is not timely filed, then the right to an appraisal will cease. The costs of the action (which do not include attorneys' fees or the fees and expenses of experts) may be determined by the Delaware Court of Chancery and taxed upon the parties as the Court of Chancery deems equitable. Upon application of a Shareholder, the Court of Chancery may order all or a portion of the expenses incurred by a Shareholder in connection with an

appraisal proceeding, including, without limitation, reasonable attorneys' fees and the fees and expenses of experts utilized in the appraisal proceeding, to be charged pro rata against the value of all the Shares entitled to appraisal. In the absence of such determination or assessment, each party bears its own expenses.

Any Shareholder who has duly demanded and perfected appraisal rights in compliance with Section 262 of the DGCL will not, after the Effective Time, be entitled to vote his or her Shares for any purpose or be entitled to the payment of dividends or other distributions thereon, except dividends or other distributions payable to holders of record of Shares as of a date prior to the Effective Time.

If any Shareholder who demands appraisal of Shares under Section 262 of the DGCL fails to perfect, successfully withdraws or loses such holder's right to appraisal, such Shareholder's Shares will be deemed to have been converted as of the Effective Time into the right to receive the Merger Consideration, less any applicable withholding taxes. A Shareholder will fail to perfect, or lose, the Shareholder's right to appraisal if no petition for appraisal is filed within 120 calendar days after the Effective Time. In addition, as indicated above, a Shareholder may withdraw his, her or its demand for appraisal in accordance with Section 262 of the DGCL and accept the Merger Consideration.

If a Shareholder wishes to exercise his, her or its appraisal rights, the Shareholder must not tender his, her or its Shares in the Offer and must strictly comply with the procedures set forth in Section 262 of the DGCL. If the Shareholder fails to take any required step in connection with the exercise of appraisal

rights, it will result in the termination or waiver of such rights.

The foregoing summary of the rights of Shareholders to seek appraisal rights under the DGCL is not intended to be a complete statement of the procedures to be followed by the Shareholders desiring to exercise any appraisal rights available thereunder and is qualified in its entirety by reference to Section 262 of the DGCL. The proper exercise of appraisal rights requires strict adherence to the applicable provisions of the DGCL. A copy of Section 262 of the DGCL is included as Annex B to this Statement.

Shareholder Approval of the Merger Not Required

Neither Avago nor Purchaser is, nor at any time during the last three years has been, an "interested shareholder" of Emulex as defined in Section 203 of the DGCL. Because the Merger will be consummated in accordance with Section 253 or Section 251(h) of the DGCL, no Shareholder vote or consent will be necessary to effect the Merger.

Delaware Business Combinations Statute / Takeover Statutes

Emulex is incorporated under the laws of the State of Delaware. In general, Section 203 of the DGCL prevents an interested shareholder (including (1) a person who owns 15% or more of a corporation's outstanding voting stock or (2) a person who is an affiliate or associate of the corporation and was the owner of 15% or more of the outstanding voting stock of the corporation at any time within the three-year period immediately prior to the date on which it is sought to be determined whether such person is an

interested shareholder, and the affiliates and associates of such person) from engaging in a "business combination" (defined to include a merger and certain other actions) with a Delaware corporation whose stock is publicly traded or held of record by more than 2,000 shareholders for a period of three years following the date such person became an interested shareholder unless:

- the transaction in which the shareholder became an interested shareholder or the business combination was approved by the Board of the corporation before the other party to the business combination became an interested shareholder;
- upon completion of the transaction that made it an interested shareholder, the interested shareholder owned at least 85% of the voting stock of the corporation outstanding at the commencement of the transaction (excluding for purposes of determining the voting stock outstanding (but not the outstanding voting stock owned by the interested shareholder) the voting stock owned by directors who are also officers or held in employee stock plans in which the employees do not have a confidential right to tender stock held by the plan in a tender or exchange offer); or
- the business combination was approved by the Board of the corporation and ratified by 66 2/3% of the outstanding voting stock which the interested shareholder did not own.

In accordance with the provisions of Section 203, at the meeting held on February 25, 2015, the Board approved the Merger Agreement and the Transaction,

as described in "—Background of the Transaction" in Item 4 above, and therefore, the restrictions of Section 203 are inapplicable to the Merger and the Transaction.

A number of states have adopted laws that purport, to varying degrees, to apply to attempts to acquire corporations that are incorporated in, or which have substantial assets, shareholders, principal executive offices or principal places of business or whose business operations otherwise have substantial economic effects in, such states. Emulex, directly or through subsidiaries, conducts business in other states, some of which may have enacted such laws. In its resolutions approving the Merger Agreement on February 25, 2015, the Board resolved that the Merger Agreement and the Transaction and the Tender and Support Agreement will be, to the extent permitted by applicable law, exempt from any such applicable takeover or anti-takeover laws.

Forecasted Financial Information

Except for quarterly guidance as to Emulex's management's expectations of Emulex's financial performance for the following fiscal quarter, Emulex's management does not as a matter of course make public projections or forecasts as to future performance or earnings. Emulex's management does annually prepare, for consideration and approval by the Board, a one-year plan of expected results of operations for budgeting purposes (the "**AOP**"), as well as a forecast of two additional fiscal years for planning purposes, which are reviewed by the Board. The AOP and the two additional year forecasts are typically prepared on a "bottom up" basis, reflecting inputs from the managers of Emulex's operating

units, revised and refined by senior management, and are not prepared with a view toward complying with generally accepted accounting principles in the United States ("**GAAP**"). The fiscal year 2015 AOP and forecasts for fiscal years 2016 and 2017 were prepared in May 2014, provided to Avago in September 2014 (and to Sponsor A, Sponsor B and Company A during 2014) and are summarized in the following table:

EMULEX CORPORATION
FORECASTED FINANCIAL INFORMATION
(Prepared by Emulex Senior Management in May 2014)
(in millions)

	Year Ending Sunday Nearest June 30,		
	2015E	**2016E**	**2017E**
Revenue	$416.2	$420.1	$437.7
Non-GAAP net income [1]	$ 49.6	$ 56.7	$ 61.7
EBITDA[1]	$ 76.3	$ 82.1	$ 87.6

(1) EBITDA (or earnings before interest, income taxes, depreciation and amortization) and non-GAAP net income are non-GAAP financial measures, as they exclude, or are subject to adjustments that effectively exclude, amounts included in the most directly comparable measure calculated and presented in accordance with GAAP in financial statements. EBITDA and non-

GAAP net income were provided by management to parties that participated in the third-party outreach process because EBITDA is a financial metric commonly used in transactional settings, and management believed that non-GAAP net income portrayed Emulex's business without certain charges that may not apply to potential third-party acquirors. These measures are not in accordance with, or a substitute for, financial measures determined under GAAP, and may be different from or inconsistent with similarly labeled non-GAAP financial measures used by other companies. EBITDA and non-GAAP net income should not be considered in isolation or as a substitute for net income, operating income, cash flows from operating activities or any other measure of financial performance presented in accordance with GAAP or as a measure of a company's profitability or liquidity.

For the forecasted periods of the fiscal years ending on the Sunday nearest June 30 of each of fiscal years 2015, 2016 and 2017, non-GAAP net income was calculated as follows:

	Year Ending Sunday Nearest June 30,		
	2015E	**2016E**	**2017E**
Net income	$(6.5)	$8.9	$28.4
Adjustments for non-cash items:			
Amortization	$27.3	$26.0	$ 9.6
Stock-Based Compensation	$15.6	$17.1	$18.0
Debt discount on 1.75% Convertible Senior Notes due November 15, 2018	$6.6	$6.0	$7.0
Adjustments for special items:			
License amortization	$7.1	—	—
Mitigation expense	$0.7	—	—
Tax adjustment	$0.8	—	—
Tax effect of GAAP valuation allowance and other	$(2.0)	$(1.3)	$(1.3)
Non-GAAP net income	$49.6	$56.7	$61.7

Other than with respect to fiscal year 2015, the foregoing line items related to the calculation of non-GAAP net income were not provided to Avago prior to execution of the Merger Agreement.

For the forecasted periods of the fiscal years ending on the Sunday nearest June 30 of each of fiscal years 2015, 2016 and 2017, EBITDA was calculated as follows:

	Year Ending Sunday Nearest June 30,		
	2015E	**2016E**	**2017E**
Non-GAAP net income	$49.6	$56.7	$61.7
Interest	$ 3.8	$ 3.5	$ 3.5
Income taxes	$ 4.3	$ 4.9	$ 5.4
Depreciation	$18.6	$17.0	$17.0
EBITDA	$76.3	$82.1	$87.6

Other than with respect to fiscal year 2015, the foregoing line items related to the calculation of EBITDA were not provided to Avago prior to execution of the Merger Agreement.

On January 14, 2015, Emulex management reviewed with Avago Emulex's preliminary estimates of its consolidated results of operations for the six-month and three-month periods ending December 28, 2014. On January 14th, Emulex management also provided Avago an updated revenue forecast for Emulex's ECD business for fiscal year 2015 that took

into account Emulex's estimated actual revenue for the first half of the 2015 fiscal year. Emulex informed Avago that management estimated that full fiscal year 2015 revenue for Emulex's ECD business was expected at that time to be $23.1 million higher than the ECD business forecast for fiscal year 2015 provided to Avago in September 2014. Emulex also provided Avago estimated actual revenue for Emulex's network visibility products business segment for the first half of the 2015 fiscal year, which showed a decrease of $9.0 million compared to Emulex's quarterly AOP for the first half of 2015.

An updated consolidated forecast for Emulex for fiscal years 2015, 2016 and 2017 was not furnished to Avago in January 2015. In December 2014, Emulex's senior management had begun to work on updates to the forecast that had been furnished to Avago in September 2014 to take into account the performance of each of Emulex's businesses in the first half of fiscal year 2015. A revised forecast was then prepared by Emulex's senior management on a "top down" basis (that is, by Emulex's senior management without substantial involvement of management of Emulex's operating units) because senior management limited the group of Emulex managers who were aware of the discussions with Avago in order to avoid potential disruption and to minimize the possibility that these discussions would become public prematurely. Emulex's senior management also added fiscal years 2018 and 2019 to the forecast on a "top down" basis in connection with the financial analysis of Avago's proposal. See "—Opinion of the Financial Advisor to the Emulex Board" above in Item 4. Emulex's senior management reviewed the revised forecast with the Board at its January 31, 2015 meeting.

The revised forecast was provided to Goldman Sachs, and a subset of the information included in the revised forecast (excluding (1) unlevered free cash flow and (2) forecasts for the second half of fiscal year 2015 ("**H2 2015**") and fiscal years 2018 and 2019) was provided to Avago on February 18, 2015 and is summarized in the following table:

EMULEX CORPORATION
FORECASTED FINANCIAL INFORMATION
(Prepared by Emulex Senior Management in January 2015)
(in millions)

	Year Ending Sunday Nearest June 30,					
	H2 2015E	**2015E**	**2016E**	**2017E**	**2018E**	**2019E**
Revenue	$207.9	$422.8	$401.6	$423.4	$432.2	$445.0
Non-GAAP net income[1]	$ 20.2	$ 48.5	$ 43.0	$ 54.5	$ 57.4	$ 59.0
EBITDA[1][2]	$ 32.0	$ 74.4	$ 65.9	$ 78.9	$ 82.9	$ 85.0
Unlevered free cash flow[1]	$ 17.0	$ 41.0	$ 13.0	$ 36.0	$ 44.0	$ 46.0

(1) EBITDA (or earnings before interest, income taxes, depreciation and amortization), non-GAAP net income and unlevered free cash flow are non-GAAP financial measures, as they exclude, or are subject to adjustments that effectively exclude, amounts included in the most directly comparable measure calculated and presented in accordance with GAAP in financial statements. These non-GAAP financial measures exclude certain

expenses and reflect an additional way of viewing aspects of Emulex's operations that, when viewed with the GAAP results and the reconciliations to corresponding GAAP financial measures, provide a more complete understanding of the results of operations and the factors and trends affecting the business. Management provided (a) EBITDA and non-GAAP net income to Avago (and other potential bidders), Goldman Sachs and the Board and (b) unlevered free cash flow to the Board and Goldman Sachs, in order to provide such parties with alternative methods for assessing Emulex's financial condition and operating results. These measures are not in accordance with, or a substitute for, financial measures determined under GAAP, and may be different from or inconsistent with similarly labeled non-GAAP financial measures used by other companies. EBITDA, non-GAAP net income and unlevered free cash flow should not be considered in isolation or as a substitute for net income, operating income, cash flows from operating activities or any other measure of financial performance presented in accordance with GAAP or as a measure of a company's profitability or liquidity.

(2) EBITDA was not specifically included in the forecasts provided to Avago prior to execution of the Merger Agreement. However, the line items necessary to enable Avago to calculate EBITDA were included in the forecasts furnished to Avago in mid-February.

For the forecasted periods of the fiscal years ending on the Sunday nearest June 30 of each of fiscal years 2015, 2016, 2017, 2018 and 2019, non-GAAP net income is calculated as follows:

	Year Ending Sunday Nearest June 30,					
	H2 2015E	**2015E**	**2016E**	**2017E**	**2018E**	**2019E**
Net income	$(7.5)	$(3.9)	$(5.7)	$20.8	$23.4	$28.0
Adjustments for non-cash items:						
Amortization	$13.1	$27.0	$26.0	$ 9.6	$ 9.6	$10.0
Stock-based compensation	$ 8.4	$15.0	$13.0	$15.9	$14.2	$14.0
Debt discount on 1.75% Convertible Senior Notes due November 15, 2018	$ 3.3	$ 6.6	$ 6.0	$ 7.0	$ 9.6	$ 7.0

Adjustments for special items:						
Royalties	$ 1.1	$ 3.0	$ 2.0	$ 0.3	—	—
License amortization	$ 1.9	$ 3.8	$ 3.1	$ 2.1	$ 1.8	—
Mitigation expense	$ 0.2	$ 0.4	—	—	—	—
Tax adjustment	$ 0.4	$ 0.5	—	—	—	—
Non-recurring severance and related costs and other	$(0.3)	$(1.5)	——	—	—	—
Tax effect of GAAP valuation allowance	$(0.4)	$(2.4)	$(1.4)	$(1.2)	$(1.2)	($0.0)
Non-GAAP net income[a]	$20.2	$48.5	$43.0	$54.5	$57.4	$59.0

(a) Materials used by Goldman Sachs in its analyses (see "—Opinion of the Financial Advisor to the Emulex Board" above in Item 4) and provided to the Board at the

February 21, 2015 and February 25, 2015 Board meetings in connection with such analyses reflected each of the foregoing items on a tax-effected basis; the forecasts furnished by Emulex to Avago reflected the tax effects on an aggregate basis. Non-GAAP net income was the same in both presentations.

The foregoing line items related to the calculation of non-GAAP net income were not provided to Avago prior to execution of the Merger Agreement.

For the forecasted periods of the fiscal years ending on the last Sunday of June of each of fiscal years 2015, 2016, 2017, 2018 and 2019, EBITDA is calculated as follows:

	Year Ending Sunday Nearest June 30,					
	H2 2015E	**2015E**	**2016E**	**2017E**	**2018E**	**2019E**
Non-GAAP net income[1]	$20.2	$48.5	$43.0	$54.5	$57.4	$59.0
Interest	$ 1.9	$ 3.8	$ 3.7	$ 3.7	$ 3.8	$ 4.0
Income Taxes	$ 0.6	$ 3.5	$ 3.2	$ 4.7	$ 5.7	$ 6.0
Depreciation	$ 9.3	$18.6	$16.0	$16.0	$16.0	$16.0
EBITDA[1][2]	$ 32.0	$74.4	$65.9	$78.9	$82.9	$85.0

For the forecasted periods of the fiscal years ending on the last Sunday of June of each of fiscal years 2015, 2016, 2017, 2018 and 2019, unlevered free cash flow is calculated as follows:

	Year Ending Sunday Nearest June 30,					
	H2 2015E	**2015E**	**2016E**	**2017E**	**2018E**	**2019E**
EBITDA	$32.0	$ 74.4	$ 65.9	$ 78.9	$ 82.9	$ 85.0
Adjustments for cash items:						
Taxes	$(0.6)	$ (3.5)	$ (3.2)	$ (4.7)	$ 5.7)	$ (6.0)
Capital expenditures	$(8.0)	$(17.3)	$(16.0)	$(16.0)	$(16.0)	$(16.0)
Change in working capital	$ 4.0	$ 5.0	$ 1.7	$ (6.0)	$ (3.5)	$ (4.0)
Adjustments for special items:						

Royalties	$(1.1)	$ (3.0)	$ (2.0)	$ (0.3)	—	—
License amortization	$(1.9)	$ (3.8)	$ (3.1)	$ (2.1)	$ (1.8)	—
Mitigation expense	$(0.2)	$ (0.4)	—	—	—	—
Tax adjustment	$(0.4)	$ (0.5)	$(20.0)	—	—	—
Other	$ 1.6	$ 5.1	$ 2.7	$ 2.1	$ 2.3	$ 1.0
Stock-based compensation	($ 8.4)	$(15.0)	$(13.0)	$(15.9)	$(14.2)	($14.0)
Unlevered free cash flow[(a)]	$17.0	$ 41.0	$ 13.0	$ 36.0	$ 44.0	$ 46.0

(a) Materials used by Goldman Sachs in its analyses (see "—Opinion of the Financial Advisor to the Emulex Board" above in Item 4) and provided to the Board at the February 21, 2015 and February 25, 2015 Board meetings in connection with such analyses reflected each of the foregoing items on a tax-effected basis; the above reconciliation reflected the tax effects on an aggregate basis. Unlevered free cash flow above is the same as the unlevered free cash flow in such analyses.

Other than capital expenditures, change in working capital and stock-based compensation, the foregoing line items related to the calculation of unlevered free cash flow were not provided to Avago prior to execution of the Merger Agreement.

The foregoing forecasts are included in this Statement solely because Emulex provided them to the Board, Goldman Sachs and, as to fiscal years 2015 – 2017 and excluding unlevered free cash flow, Avago in connection with the Transaction. The forecasts reflect numerous estimates and assumptions with respect to industry performance, general business, economic, regulatory, market and financial conditions and other future events, as well as matters specific assumptions to Emulex's business, all of which are difficult to predict and many of which are beyond Emulex's control. These assumptions are subjective in many respects and thus are susceptible to multiple interpretations and periodic revisions based on actual experience and business developments. In providing its financial advice and preparing its fairness opinion, Goldman Sachs assumed that the forecasts were prepared in good faith based on assumptions believed by management to be reasonable at the time the forecasts were made. While management so prepared the forecasts, there can be no assurance that the estimates and assumptions used to prepare the forecasts will prove to be accurate, and actual results may materially differ. As such, the forecasts constitute forward-looking information and are subject to risks and uncertainties, including the various risks set forth in Emulex's Form 10-K for the year ending June 29, 2014 and the other reports filed by Emulex with the SEC. The forecasts cover multiple years, and such information by its nature becomes less reliable with each successive year.

The forecasts were not prepared with a view toward public disclosure or toward complying with GAAP, the published guidelines of the SEC regarding forecasts or the guidelines established by the

American Institute of Certified Public Accountants for preparation and presentation of prospective financial information. The forecasts were prepared by Emulex's management. Neither Emulex's independent registered public accounting firm, nor any other independent accountants, nor Goldman Sachs have compiled, examined or performed any procedures with respect to the forecasts, nor have they expressed any opinion or any other form of assurance on such information or its achievability, and they assume no responsibility for, and disclaim any association with, the forecasts. Furthermore, the forecasts do not take into account any circumstances or events occurring after the date they were prepared.

Emulex's filings with the SEC are available at www.sec.gov. Readers of this Statement are cautioned not to place undue reliance on the forecasts. The inclusion of the forecasts in this Statement should not be regarded as an indication that Emulex considers the forecasts to be predictive of actual future events, and the forecasts should not be relied upon as such. None of Emulex, Purchaser, Avago or their respective affiliates, advisors, officers, directors or advisors can give any assurance that actual results will not differ from the forecasts, and none of them undertakes any obligation to update or otherwise revise or reconcile the forecasts to reflect circumstances existing after the date such forecasts were generated or to reflect the occurrence of future events, even in the event that any or all of the assumptions underlying the forecasts are shown to be in error. None of Emulex, Purchaser, Avago or any of their respective affiliates intends to make publicly available any update or other revisions to the forecasts, except as required by law. None of Emulex,

Purchaser, Avago or their respective affiliates, advisors, officers, directors or advisors has made or makes any representation to any Shareholder or other person regarding the ultimate performance of Emulex compared to the information contained in the forecasts or that forecasted results will be achieved. None of Emulex, Purchaser, Avago or any of their respective affiliates or representatives makes any representation to any other person regarding the forecasts. The forecasts are not being included in this Statement to influence a Shareholder's decision whether to tender his, her or its Shares in the Offer.

SEC Periodic Reports

For additional information regarding the business and financial results of Emulex, please see the following documents that have been filed by Emulex with the SEC, each of which is incorporated herein by reference:

- Form 10-K for the fiscal year ended June 29, 2014, filed on August 28, 2014;
- Form 10-K/A, Amendment No. 1, filed on October 27, 2014, for the purpose of adding Part III information to that report; and
- Form 10-Q for the quarter ended December 28, 2014, filed on January 30, 2015 and for the quarter ended September 28, 2014, filed on October 31, 2014.

Certain Litigation

On March 3, 2015, two putative shareholder class action complaints were filed in the Court of Chancery of the State of Delaware against Emulex, its directors, Avago and Purchaser, captioned as follows: *James Tullman v. Emulex Corporation, et al.*, Case No.

10743-VCL (Del. Ch.); *Moshe Silver ACF/Yehudit Silver U/NY/UTMA v. Emulex Corporation, et al.*, Case No. 10744-VCL (Del. Ch.). On March 11, 2015, a third complaint was filed in the Delaware Court of Chancery, captioned *Hoai Vu v. Emulex Corporation, et al.*, Case No. 10776-VCL (Del. Ch.). The complaints allege, among other things, that Emulex's directors breached their fiduciary duties by approving the Merger Agreement, and that Avago and Purchaser aided and abetted these alleged breaches of fiduciary duty. The complaints seek, among other things, either to enjoin the proposed transaction or to rescind it should it be consummated, as well as damages, including attorneys' and experts' fees. The Delaware Court of Chancery has entered an order consolidating the three Delaware actions under the caption *In re Emulex Corporation Stockholder Litigation*, Consolidated C.A. No. 10743-VCL.

Forward-Looking Statements

Information both included and incorporated by reference in this Statement contains forward-looking statements as defined by the U.S. federal securities law which are based on Emulex's current expectations and assumptions, which are subject to a number of risks and uncertainties that could cause actual results to differ materially from those anticipated, projected or implied, including, among other things, risks relating to the expected timing of the completion and financial benefits of the Offer and the Merger.

This Statement contains forward-looking statements based on current expectations that involve a number of risks and uncertainties. Forward-looking statements may be typically identified by such words as "may," "will," "could," "should,"

"expect," "anticipate," "plan," "likely," "believe," "estimate," "project," "intend" and other similar expressions among others. These forward-looking statements are subject to known and unknown risks and uncertainties that could cause Emulex's actual results to differ materially from the expectations expressed in the forward-looking statements. Although Emulex believes that the expectations reflected in the forward-looking statements are reasonable, any or all of such forward-looking statements may prove to be incorrect. Consequently, no forward-looking statements may be guaranteed and there can be no assurance that the actual results or developments anticipated by such forward looking statements will be realized or, even if substantially realized, that they will have the expected consequences to, or effects on, Emulex or its business or operations.

Factors which could cause actual results to differ from those projected or contemplated in any such forward-looking statements include, but are not limited to, the following factors: (1) the risk that the conditions to the closing of the Transaction are not satisfied, including the risk that Avago may not receive a sufficient number of Shares tendered from the Shareholders or required regulatory approvals to complete the Offer, (2) litigation relating to the Transaction, (3) uncertainties as to the timing of the consummation of the Transaction and the ability of Avago and Emulex to consummate the Transaction, (4) risks that the Transaction disrupts the current plans and operations of Emulex, (5) the ability of Emulex to retain and hire key personnel, (6) competitive responses to the Transaction, (7) unexpected costs, charges or expenses resulting

from the Transaction, (8) potential adverse reactions or changes to business relationships resulting from the announcement or completion of the Transaction, (9) Avago's ability to achieve the growth prospects and synergies expected from the Transaction, as well as delays, challenges and expenses associated with integrating Emulex with Avago's existing businesses, (10) legislative, regulatory and economic developments, and the factors described in "— Reasons for the Recommendation" in Item 4 above. The foregoing review of important factors that could cause actual events to differ from expectations should not be construed as exhaustive and should be read in conjunction with statements that are included herein and elsewhere, including the risk factors included in Emulex's most recent Quarterly Report on Form 10-Q and Annual Report on Form 10-K filed with the SEC. Emulex can give no assurance that the conditions to the Transaction will be satisfied. Emulex has no intent or obligation to publicly update or revise any of these forward looking statements, whether as a result of new information, future events or otherwise, except as required by law.

Item 9. Exhibits

The following exhibits are filed herewith or incorporated herein by reference:

Exhibit No.	Description
(a)(1)(A)	Offer to Purchase, dated April 7, 2015 (incorporated by reference to Exhibit (a)(1)(i) of the Schedule TO filed with the SEC by Purchaser, Avago and Avago's Parent on April 7, 2015).

Exhibit No.	Description
(a)(1)(B)	Form of Letter of Transmittal (including Guidelines for Certification of Taxpayer Identification Number on Form W-9) (incorporated by reference to Exhibit (a)(1)(ii) of the Schedule TO filed with the SEC by Purchaser, Avago and Avago's Parent on April 7, 2015).
(a)(1)(C)	Form of Notice of Guaranteed Delivery (incorporated by reference to Exhibit (a)(1)(iii) of the Schedule TO filed with the SEC by Purchaser, Avago and Avago's Parent on April 7, 2015).
(a)(1)(D)	Form of Letter to Brokers, Dealers, Commercial Banks, Trust Companies and Other Nominees (incorporated by reference to Exhibit (a)(1)(iv) of the Schedule TO filed with the SEC by Purchaser, Avago and Avago's Parent on April 7, 2015).
(a)(1)(E)	Form of Letter to Clients for use by Brokers, Dealers, Commercial Banks, Trust Companies and other Nominees (incorporated by reference to Exhibit (a)(1)(v) of the Schedule TO filed by Purchaser, Avago and Avago's Parent on April 7, 2015).
(a)(1)(F)	Summary Advertisement as published in The New York Times on April 7, 2015 (incorporated by reference to Exhibit (a)(1)(vi) of the Schedule TO filed with the SEC by Purchaser,

Exhibit No.	Description
	Avago and Avago's Parent on April 7, 2015).
(a)(2)	Letter to Emulex Shareholders from the Chairman of the Board of Emulex, dated April 7, 2015 (filed with this Statement).
(a)(5)(A)	Joint Press Release, dated February 25, 2015 (incorporated by reference to Exhibit 99.1 on the Current Report on Form 8-K filed with the SEC by Emulex on February 25, 2015).
(a)(5)(B)	Fairness Opinion of Goldman, Sachs & Co., dated February 25, 2015 (incorporated by reference to Annex A attached to this Statement).
(e)(1)	Agreement and Plan of Merger, dated as of February 25, 2015, by and among Emulex, Avago and Purchaser (incorporated by reference to Exhibit 2.1 of the Current Report on Form 8-K dated February 25, 2015 and filed with the SEC by Emulex on February 26, 2015).
(e)(2)	Tender and Support Agreement, dated as of February 25, 2015, by and among Avago, Purchaser and the directors and officers of Emulex party thereto (incorporated by reference to Exhibit 99.1 of the Current Report on Form 8-K dated February 25, 2015 and filed

Exhibit No.	Description
	with the SEC by Emulex on February 26, 2015).
(e)(3)	Confidentiality Agreement, dated as of August 28, 2014, by and between Emulex and Avago's Parent (incorporated by reference to Exhibit (d)(2) of the Schedule TO filed with the SEC by Purchaser, Avago and Avago's Parent on April 7, 2015).
(e)(4)	Certificate of Incorporation, as amended (incorporated by reference to Exhibit 3.1 to Emulex's 1997 Annual Report on Form 10-K filed with the SEC on September 25, 1997)
(e)(5)	Amended and Restated Bylaws of Emulex dated as of February 21, 2015 (incorporated by reference to Exhibit 3.1 to the Current Report on Form 8-K dated February 21, 2015 and filed with the SEC by Emulex on February 26, 2015).
(e)(6)	Form of Indemnification Agreement between Emulex and each of its officers and directors (filed with this Statement).
(e)(7)	Amended Emulex Corporation Change in Control Retention Plan (incorporated by reference to Exhibit 10.5 to Emulex's Quarterly Report on Form 10-Q filed with the SEC on October 29, 2012).

Exhibit No.	Description
(e)(8)	Amendment to Key Employee Retention Agreement between Emulex and Jeffrey W. Benck, dated July 12, 2013 (incorporated by reference to Exhibit 10.3 to Emulex's Current Report on Form 8-K filed with the SEC on July 15, 2013).
(e)(9)	Amended and Restated Key Employee Retention Agreement of Jeffrey W. Benck, effective as of January 1, 2013 (incorporated by reference to Exhibit 10.2 to Emulex's Quarterly Report on Form 10-Q filed with the SEC on October 29, 2012).
(e)(10)	Amended and Restated Emulex Corporation 2005 Equity Incentive Plan (incorporated by reference to Appendix A to Emulex's definitive proxy statement on Schedule 14A for the 2012 annual meeting of its Shareholders filed with the SEC on October 9, 2012).
(e)(11)	Emulex Corporation Stock Award Plan for Non-Employee Directors, as amended (incorporated by reference to Appendix B to Emulex's definitive proxy statement on Schedule 14A for the 2012 annual meeting of its Shareholders filed with the SEC on October 9, 2012).
(e)(12)	Emulex Corporation Employee Stock Purchase Plan, as amended

Exhibit No.	Description
	(incorporated by reference to Appendix A to Emulex's definitive proxy statement on Schedule 14A for the 2013 annual meeting of its Shareholders filed with the SEC on December 23, 2013)
(e)(13)	Appendix to the Restricted Stock Unit Award Agreement for Non-U.S. Grantees under the Emulex Corporation Amended and Restated 2005 Equity Incentive Plan (incorporated by reference to Exhibit 10.1 to Emulex's 2013 Annual Report on Form 10-K filed with the SEC on August 29, 2013).
(e)(14)	Emulex Corporation Stock Award Plan for Non-Employee Directors, as amended (incorporated by reference to Appendix B to Emulex's definitive proxy statement for the 2013 annual meeting of its Shareholders filed with the SEC on October 9, 2012).
(e)(15)	Form of Director Stock Option Agreement and related form of Grant Summary for grants made pursuant to the Stock Award Plan for Non-Employee Directors (incorporated by reference to Exhibit 10.1 to Emulex's Current Report on Form 8-K filed with the SEC on August 30, 2005).
(e)(16)	Form of Amendment to Incentive Stock Option Agreements under the

Exhibit No.	Description
	Amended and Restated 2005 Equity Incentive Plan (incorporated by reference to Exhibit 10.25 to Emulex's 2010 Annual Report on Form 10-K, filed with the SEC on August 26, 2010).
(e)(17)	Executive Incentive Compensation Plan of Emulex, as amended (incorporated by reference to Exhibit 10.1 to Emulex's Current Report on Form 8-K filed with the SEC on August 25, 2014).
(e)(18)	Form of Emulex Corporation 2005 Equity Incentive Plan Restricted Stock Award Agreement (incorporated by reference to Exhibit 10.1 to Emulex's Quarterly Report on Form 10-Q filed with the SEC on May 12, 2006).
(e)(19)	Form of Notice of Grant of Award and Award Agreement for the granting of Restricted Stock (incorporated by reference to Exhibit 10.2 to Emulex's Quarterly Report on Form 10-Q filed with the SEC on May 12, 2006).
(e)(20)	Offer Letter, dated May 4, 2008, from Emulex to Jeffrey W. Benck (incorporated by reference to Exhibit 10.1 to Emulex's Current Report on Form 8-K filed with the SEC on May 12, 2008).

Exhibit No.	Description
(e)(21)	Form of Amendment to Non-Qualified Stock Option Agreement under the Emulex Corporation 2005 Equity Incentive Plan (incorporated by reference to Exhibit 10.2 to Emulex's Current Report on Form 8-K filed with the SEC on January 16, 2009).
(e)(22)	Form of Amendment to Restricted Stock Award Agreement (incorporated by reference to Exhibit 10.3 to Emulex's Current Report on Form 8-K filed with the SEC on January 16, 2009)
(e)(23)	Form of Notice of Grant of Award and Award Agreement for the granting of Restricted Stock Units (incorporated by reference to Exhibit 10.3 to Emulex's Quarterly Report on Form 10-Q filed with the SEC on January 30, 2009).
(e)(24)	Form of Restricted Stock Unit Award Agreement under the Amended and Restated 2005 Equity Incentive Plan (incorporated by reference to Exhibit 10.4 to Emulex's Quarterly Report on Form 10-Q filed with the SEC on January 30, 2009).
(e)(25)	Form of Restricted Stock Unit Award Agreement for Non-U.S. Grantees under the Amended and Restated 2005 Equity Incentive Plan (incorporated by reference to Exhibit

Exhibit No.	Description
	10.6 to Emulex's Quarterly Report on Form 10-Q filed with the SEC on January 30, 2009).
(e)(26)	Form of Amendment to Restricted Stock Unit Agreements under the Emulex Corporation 2005 Equity Incentive Plan (incorporated by reference to Exhibit 10.52 to Emulex's 2010 Annual Report on Form 10-K filed with the SEC on August 26, 2010).
(e)(27)	Form of Performance Stock Unit Award Agreement under the Amended and Restated 2005 Equity Incentive Plan (incorporated by reference to Exhibit 10.52 to Emulex's 2012 Annual Report on Form 10-K filed with the SEC on August 30, 2012).
(e)(28)	Employment Letter, dated January 3, 2014, between Emulex and Kyle Wescoat (incorporated by reference to Exhibit 10.1 to Emulex's Current Report on Form 8-K filed with the SEC on January 7, 2014).
(e)(29)	Severance Agreement, dated January 6, 2014, between Emulex and Kyle Wescoat (incorporated by reference to Exhibit 10.2 to Emulex's Current Report on Form 8-K filed with the SEC on January 7, 2014).

Exhibit No.	Description
(e)(30)	Form of Performance Cash Settled Unit Award Agreement under the Amended and Restated 2005 Equity Incentive Plan (incorporated by reference to Exhibit 10.2 to Emulex's Quarterly Report on Form 10-Q filed with the SEC on May 10, 2013).
(e)(31)	Form of Cash-Settled Restricted Stock Unit Award Agreement under the Amended and Restated 2005 Equity Incentive Plan (incorporated by reference to Exhibit 10.3 to Emulex's Quarterly Report on Form 10-Q filed with the SEC on May 10, 2013).
(e)(32)	Form of Amended and Restated Appendix to Restricted Stock Award Agreement, Restricted Stock Unit Award Agreement, Nonqualified Stock Option Agreement, Incentive Stock Option Agreement, Cash-Settled Restricted Stock Unit Award Agreement, and Performance Stock Unit Award Agreement for Change in Control Retention Plan Participants or Employees Covered by a Key Employee Retention Agreement under the Amended and Restated 2005 Equity Incentive Plan (incorporated by reference to Exhibit 10.4 to Emulex's Quarterly Report on Form 10-Q filed with the SEC on May 10, 2013).

Exhibit No.	Description
(e)(33)	Form of Appendix to Restricted Stock Unit Award Agreement for Non-U.S. Grantees under the Amended and Restated 2005 Equity Incentive Plan (incorporated by reference to Exhibit 10.5 to Emulex's Quarterly Report on Form 10-Q filed with the SEC on May 10, 2013).
(e)(34)	Severance Agreement, dated July 12, 2013, between Emulex and Jeffrey W. Benck (incorporated by reference to Exhibit 10.2 to Emulex's Current Report on Form 8-K filed with the SEC on July 15, 2013).
(g)	None.
Annex A	Fairness Opinion of Goldman, Sachs & Co., dated February 25, 2015
Annex B	Section 262 of the Delaware General Corporation Law

SIGNATURE

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

EMULEX CORPORATION

By: s/ Jeffrey W. Benck

Name: Jeffrey W. Benck

Title: President and Chief Executive Officer

Dated: April 7, 2015

Annex A

200 West Street | New York, NY 10282-2198
Tel: 212-902-1000 | Fax: 212-902-3000

Goldman Sachs

PERSONAL AND CONFIDENTIAL

February 25, 2015

Board of Directors
Emulex Corporation
3333 Susan Street
Costa Mesa, CA 92626

Ladies and Gentlemen:

You have requested our opinion as to the fairness from a financial point of view to the holders (other than Avago Technologies Wireless (U.S.A.) Manufacturing Inc. ("Avago") and its affiliates) of the outstanding shares of common stock, par value $0.10 per share (the "Shares") , of Emulex Corporation (the "Company") of the $8.00 in cash per Share to be paid to such holders pursuant to the Agreement and Plan of Merger, dated as of February 25, 2015 (the "Agreement"), by and among Avago, Emerald Merger Sub, Inc., a wholly owned subsidiary of Avago ("Acquisition Sub"), and the Company. The Agreement provides for a tender offer for all of the Shares (the "Tender Offer") pursuant to which Acquisition Sub will pay $8.00 in cash per Share for each Share accepted. The Agreement further provides that. following completion of the Tender Offer, Acquisition Sub will be merged with and into the Company (the "Merger") and each outstanding Share (other than Shares held in the treasury of the

Company, Shares already owned by Avago or any of its direct or indirect wholly-owned subsidiaries, including Acquisition Sub, and dissenting Shares) will be converted into the right to be paid $8.00 in cash.

Goldman, Sachs & Co. and its affiliates are engaged in advisory, underwriting and financing, principal investing, sales and trading, research, investment management and other financial and non-financial activities and services for various persons and entities. Goldman, Sachs & Co. and its affiliates and employees, and funds or other entities they manage or in which they invest or have other economic interests or with which they co-invest, may at any time purchase, sell, hold or vote long or short positions and investments in securities, derivatives, loans, commodities, currencies, credit default swaps and other financial instruments of the Company, Avago, any of their respective affiliates and third parties, or any currency or commodity that may be involved in the transaction contemplated by the Agreement (the "Transaction"). We have acted as financial advisor to the Company in connection with, and have participated in certain of the negotiations leading to, the Transaction. We expect to receive fees for our services in connection with the Transaction, the principal portion of which is contingent upon consummation of the Transaction, and the Company has agreed to reimburse certain of our expenses arising, and indemnify us against certain liabilities that may arise, out of our engagement. We have provided certain financial advisory and/or underwriting services to the Company and/or its affiliates from time to time for which our Investment Banking Division has received, and may receive,

compensation, including having acted as sole bookrunning manager with respect to an offering of the Company's 1.75% Convertible Senior Notes due November 15, 2018 (aggregate principal amount $175,000,000 in November 2013. We may also in the future provide financial advisory and/or underwriting services to the Company, Avago and their respective affiliates for which our Investment Banking Division may receive compensation.

In connection with this opinion, we have reviewed, among other things, the Agreement; annual reports to stockholders and Annual Reports on Form 10-K of the Company for the five fiscal years ended June 29, 2014; certain interim reports to stockholders and Quarterly Reports on Form 10-Q of the Company; certain other communications from the Company to its stockholders; certain publicly available research analyst reports for the Company; and certain internal financial analyses and forecasts for the Company prepared by its management, as approved for our use by the Company (the "Forecasts"). We have also held discussions with members of the senior management of the Company regarding their assessment of the past and current business operations, financial condition and future prospects of the Company; reviewed the reported price and trading activity for the Shares; compared certain financial and stock market information for the Company with similar information for certain other companies the securities of which are publicly traded; reviewed the financial terms of certain recent business combinations in the semiconductor industry and in other industries; and performed such other studies and analyses, and considered such other factors, as we deemed appropriate.

For purposes of rendering this opinion, we have, with your consent, relied upon and assumed the accuracy and completeness of all of the financial, legal, regulatory, tax, accounting and other information provided to, discussed with or reviewed by, us, without assuming any responsibility for independent verification thereof. In that regard, we have assumed with your consent that the Forecasts have been reasonably prepared on a basis reflecting the best currently available estimates and judgments of the management of the Company. We have not made an independent evaluation or appraisal of the assets and liabilities (including any contingent, derivative or other off-balance-sheet assets and liabilities) of the Company or any of its subsidiaries and we have not been furnished with any such evaluation or appraisal. We have assumed that all governmental, regulatory or other consents and approvals necessary for the consummation of the Transaction will be obtained without any adverse effect on the expected benefits of the Transaction in any way meaningful to our analysis. We have assumed that the Transaction will be consummated on the terms set forth in the Agreement, without the waiver or modification of any term or condition the effect of which would be in any way meaningful to our analysis.

Our opinion does not address the underlying business decision of the Company to engage in the Transaction, or the relative merits of the Transaction as compared to any strategic alternatives that may be available to the Company; nor does it address any legal, regulatory, tax or accounting matters. This opinion addresses only the fairness from a financial point of view to the holders (other than Avago and its

affiliates) of Shares, as of the date hereof, of the $8.00 in cash per Share to be paid to such holders pursuant to the Agreement. We do not express any view on, and our opinion does not address, any other term or aspect of the Agreement or Transaction or any term or aspect of any other agreement or instrument contemplated by the Agreement or entered into or amended in connection with the Transaction, including, the fairness of the Transaction to, or any consideration received in connection therewith by, the holders of any other class of securities, creditors, or other constituencies of the Company; nor as to the fairness of the amount or nature of any compensation to be paid or payable to any of the officers, directors or employees of the Company, or class of such persons, in connection with the Transaction, whether relative to the $8.00 in cash per Share to be paid to the holders (other than Avago and its affiliates) of Shares pursuant to the Agreement or otherwise. We are not expressing any opinion as to the impact of the Transaction on the solvency or viability of the Company or Avago or the ability of the Company or Avago to pay their respective obligations when they come due. Our opinion is necessarily based on economic, monetary, market and other conditions as in effect on, and the information made available to us as of, the date hereof and we assume no responsibility for updating, revising or reaffirming this opinion based on circumstances, developments or events occurring after the date hereof. Our advisory services and the opinion expressed herein are provided for the information and assistance of the Board of Directors of the Company in connection with its consideration of the Transaction and such opinion does not constitute a recommendation as to whether or not any

holder of Shares should tender such Shares in connection with the Tender Offer or how any holder of Shares should vote with respect to the Merger or any other matter. This opinion has been approved by a fairness committee of Goldman, Sachs & Co.

Based upon and subject to the foregoing, it is our opinion that, as of the date hereof, the $8.00 in cash per Share to be paid to the holders (other than Avago and its affiliates) of Shares pursuant to the Agreement is fair from a financial point of view to such holders.

Very truly yours,

s/ Goldman Sachs & Co.
(GOLDMAN, SACHS & CO.)

Annex B

SECTION 262 OF GENERAL CORPORATION LAW OF THE STATE OF DELAWARE

§ 262. Appraisal rights

(a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words; and the words "depository receipt" mean a receipt or other instrument issued by a depository representing an interest in 1 or more shares, or fractions thereof, solely of stock of a corporation, which stock is deposited with the depository.

(b) Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a merger or

consolidation to be effected pursuant to § 251 (other than a merger effected pursuant to § 251(g) of this title and, subject to paragraph (b)(3) of this section, § 251(h) of this title), § 252, § 254, § 255, § 256, § 257, § 258, § 263 or § 264 of this title:

(1) Provided, however, that, except as expressly provided in § 363(b) of this title, no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of the meeting of stockholders to act upon the agreement of merger or consolidation, were either (i) listed on a national securities exchange or (ii) held of record by more than 2,000 holders; and further provided that no appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in § 251(f) of this title.

(2) Notwithstanding paragraph (b)(1) of this section, appraisal rights under this section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to §§ 251, 252, 254, 255, 256,

257, 258, 263 and 264 of this title to accept for such stock anything except:

a. Shares of stock of the corporation surviving or resulting from such merger or consolidation, or depository receipts in respect thereof;

b. Shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or held of record by more than 2,000 holders;

c. Cash in lieu of fractional shares or fractional depository receipts described in the foregoing paragraphs (b)(2)a. and b. of this section; or

d. Any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing paragraphs (b)(2)a., b. and c. of this section.

(3) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under § 251(h), § 253 or § 267 of this title is not owned by the parent immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.

(4) In the event of an amendment to a corporation's certificate of incorporation contemplated by § 363(a) of this title, appraisal rights shall be available as contemplated by § 363(b) of this title, and the procedures of this section, including those set forth in subsections (d) and (e) of this section, shall apply as nearly as practicable, with the word "amendment" substituted for the words "merger or consolidation," and the word "corporation" substituted for the words "constituent corporation" and/or "surviving or resulting corporation."

(c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the procedures of this section, including those set forth in subsections (d) and (e) of this section, shall apply as nearly as is practicable.

(d) Appraisal rights shall be perfected as follows:

(1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to

the meeting, shall notify each of its stockholders who was such on the record date for notice of such meeting (or such members who received notice in accordance with § 255(c) of this title) with respect to shares for which appraisal rights are available pursuant to subsection (b) or (c) of this section that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section and, if 1 of the constituent corporations is a nonstock corporation, a copy of § 114 of this title. Each stockholder electing to demand the appraisal of such stockholder's shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of such stockholder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such stockholder's shares. A proxy or vote against the merger or consolidation shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation shall notify each stockholder of each constituent corporation who has

complied with this subsection and has not voted in favor of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

(2) If the merger or consolidation was approved pursuant to § 228, § 251(h), § 253, or § 267 of this title, then either a constituent corporation before the effective date of the merger or consolidation or the surviving or resulting corporation within 10 days thereafter shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation, and shall include in such notice a copy of this section and, if 1 of the constituent corporations is a nonstock corporation, a copy of § 114 of this title. Such notice may, and, if given on or after the effective date of the merger or consolidation, shall, also notify such stockholders of the effective date of the merger or consolidation. Any stockholder entitled to appraisal rights may, within 20 days after the date of mailing of such notice or, in the case of a merger approved pursuant to § 251(h) of this title, within the later of the consummation of the tender or exchange offer contemplated by

§ 251(h) of this title and 20 days after the date of mailing of such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such holder's shares. If such notice did not notify stockholders of the effective date of the merger or consolidation, either (i) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation or (ii) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date; provided, however, that if such second notice is sent more than 20 days following the sending of the first notice or, in the case of a merger approved pursuant to § 251(h) of this title, later than the later of the consummation of the tender or exchange offer contemplated by § 251(h) of this title and 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal

of such holder's shares in accordance with this subsection. An affidavit of the secretary or assistant secretary or of the transfer agent of the corporation that is required to give either notice that such notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. For purposes of determining the stockholders entitled to receive either notice, each constituent corporation may fix, in advance, a record date that shall be not more than 10 days prior to the date the notice is given, provided, that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business on the day next preceding the day on which the notice is given.

(e) Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with subsections (a) and (d) of this section hereof and who is otherwise entitled to appraisal rights, may commence an appraisal proceeding by filing a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder who has not

commenced an appraisal proceeding or joined that proceeding as a named party shall have the right to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) of this section hereof, upon written request, shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after such stockholder's written request for such a statement is received by the surviving or resulting corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d) of this section hereof, whichever is later. Notwithstanding subsection (a) of this section, a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person may, in such person's own name, file a petition or request from the corporation the statement described in this subsection.

(f) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting

corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. If the petition shall be filed by the surviving or resulting corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery, if so ordered by the Court, shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders shown on the list at the addresses therein stated. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices by mail and by publication shall be approved by the Court, and the costs thereof shall be borne by the surviving or resulting corporation.

(g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares and who hold stock represented by certificates to

submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder.

(h) After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing appraisal proceedings. Through such proceeding the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. Unless the Court in its discretion determines otherwise for good cause shown, interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount rate (including any surcharge) as established from time to time during the period between the effective date of the merger and the date of payment of the judgment. Upon application by the surviving or resulting corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, proceed to trial upon the appraisal prior to the final determination of

the stockholders entitled to an appraisal. Any stockholder whose name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and who has submitted such stockholder's certificates of stock to the Register in Chancery, if such is required, may participate fully in all proceedings until it is finally determined that such stockholder is not entitled to appraisal rights under this section.

(i) The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto. Payment shall be so made to each such stockholder, in the case of holders of uncertificated stock forthwith, and the case of holders of shares represented by certificates upon the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any state.

(j) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation,

reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal.

(k) From and after the effective date of the merger or consolidation, no stockholder who has demanded appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (e) of this section, or if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of such stockholder's demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just; provided, however that this provision shall not affect the right of any stockholder who has not commenced an

appraisal proceeding or joined that proceeding as a named party to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation within 60 days after the effective date of the merger or consolidation, as set forth in subsection (e) of this section.

(l) The shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.

[Attorney information omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY VARJABEDIAN, On Behalf of Himself and All Others Similarly Situated, Plaintiff, v. EMULEX CORPORATION, BRUCE C. EDWARDS, JEFFREY W. BENCK, GREGORY S. CLARK, GARY J. DAICHENDT, PAUL F. FOLINO, BEATRIZ V. INFANTE, JOHN A. KELLEY, RAHUL N. MERCHANT, NERSI NAZARI, DEAN A. YOOST, AVAGO TECHNOLOGIES WIRELESS (U.S.A.) MANUFACTURING, INC., and EMERALD MERGER SUB, INC., Defendants.	Case Number 8:15-cv-00554-CJC-JCG **AMENDED CLASS ACTION COMPLAINT FOR VIOLATION OF SECTIONS 14(d)4 , 14(e) AND 20(a) OF THE SECURITIES EXCHANGE ACT OF 1934 AND 17 C.F.R. § 240.14d-9** **JURY TRIAL DEMANDED**

Lead Plaintiff Jerry Mutza ("Lead Plaintiff"), on behalf of himself and all others similarly situated, by his attorneys, alleges the following upon information and belief, except as to those allegations specifically pertaining to Lead Plaintiff and his counsel, which are made on personal knowledge, based on the investigation conducted by Lead Plaintiff's counsel.

That investigation included reviewing and analyzing information concerning Avago Technologies Wireless (U.S.A.) Manufacturing, Inc. ("Avago") acquisition of Emulex Corporation ("Emulex" or the "Company"), which Lead Plaintiff (through his counsel) obtained from, among other sources: i) Publicly available press releases, news articles, and other media reports; ii) Publicly available financial information concerning Emulex; and iii) Filings with the U.S. Securities and Exchange Commission ("SEC") made in connection with the Transaction (defined below).

NATURE OF THE CASE

1. This is a stockholder class action on behalf of the former holders of the common stock of Emulex, against Emulex, certain officers and/or directors of Emulex (the "Individual Defendants" or "Board"), Avago, and Emerald Merger Sub, Inc. ("Merger Sub" and collectively with the Individual Defendants, Emulex and Avago, the "Defendants"), for their violations of Sections 14(d)(4) , 14(e) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.SC. §§78n(d)(4),78n(e), 78t(a), and SEC Rule 14d-9, 17 C.F.R. §240.14d-9(d) ("Rule 14d-9").

2. Defendants have violated the above-referenced Sections of the Exchange Act by causing a materially incomplete and misleading Schedule 14D-9 Solicitation/Recommendation Statement ("Recommendation Statement") to be filed with the SEC[1]. The Recommendation Statement

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[1] Emulex, Inc., Solicitation/Recommendation Statement (Schedule 14D-9) (April 7, 2015), http://www.sec.gov/Archives/edgar/data/350917/000157104915002655/t1500561_sc14d9.htm (last visited Sept. 11, 2015).

recommended that Emulex stockholders tender their shares pursuant to the terms of a tender offer (the "Tender Offer"), whereby Avago acquired all the outstanding shares of common stock of Emulex for $8.00 per share (the "Merger Consideration").

3. On February 25, 2015, Emulex, Avago and Merger Sub entered into a definitive Agreement and Plan of Merger (the "Merger Agreement"). Concurrently with the execution of the Merger Agreement, certain Emulex directors and executive officers entered into a Tender and Support Agreement ("Support Agreement") with Avago and Merger Sub, pursuant to which they agreed to tender their Emulex shares, representing 2.5% of Emulex outstanding public stock, in the Tender Offer.

4. Pursuant to the terms of the Merger Agreement, Avago commenced the Tender Offer on April 7, 2015. The Tender Offer expired at 12:00 midnight EST on May 5, 2015, with only 60.58% of the outstanding shares of the Company's common stock tendered. Following the completion of the Tender Offer, Merger Sub merged with and into Emulex, with Emulex surviving as a wholly owned subsidiary of Avago (the "Merger" and together with the Tender Offer, the "Transaction").

5. The $8.00 per share Merger Consideration was inadequate, as Emulex had experienced significant growth in the months leading up to the Tender Offer and had consistently exceeded management's revenue and earnings expectations. The Merger Consideration also failed to adequately value Emulex's product portfolio and prospects for future growth.

6. Defendants also agreed to unreasonable deal-protection devices that unfairly favored Avago and discouraged other potential bidders from submitting a superior offer for the Company. These preclusive devices included: (i) a nonsolicitation provision that restricted the Board from soliciting other potentially superior offers for the Company; (ii) an "information rights" provision, which provided Avago with unfettered access to information about other potential proposals, gave Avago four business days to match any competing offer, and provided Avago with the perpetual right to attempt to match any superior bid; and (iii) a termination fee of $19.5 million, which deterred other potential suitors from making a superior proposal.

7. As discussed below, the consideration Emulex stockholders received in connection with the Transaction and the process by which Defendants consummated the Transaction were fundamentally unfair to Lead Plaintiff and the other common stockholders of the Company. Defendants asked Emulex stockholders to tender their shares for inadequate consideration based upon the materially incomplete and misleading representations and information contained in the Recommendation Statement, in violation of Sections 14(d)(4), 14(e), and 20(a) of the Exchange Act. Specifically, Defendants intentionally or recklessly omitted from the Recommendation Statement a material financial analysis performed by Goldman, Sachs & Co. ("Goldman Sachs"), the Board's financial advisor, commonly referred to as a "Precedent Transactions Analysis" or "Premium Analysis", and entitled the "Selected Semiconductor Transactions" Analysis in Goldman Sachs' presentations to the Board (*See*

Exhibit A, filed herewith, at ELX91). And the reason for that is clear – **the analysis showed that the premium Emulex's stockholders ultimately received in connection with the Transaction was drastically below the premium stockholders of similar companies had received in connection with comparable transactions in recent years**. Specifically, Goldman Sachs' analysis showed that while the median premium over the target company's undisturbed stock price for the transactions it reviewed was **50.8%,** Emulex's stockholders only received a **26.4%** premium to Emulex's closing price on the last trading day prior to the date the Transaction was announced; and while the median premium over the target company's 52-week high price for the transactions Goldman Sachs reviewed was **17.6%,** Emulex's stockholders only received a **4.8%** premium based on the Company's 52-week high closing price.

8. Despite having been presented with and reviewing Goldman Sachs' Selected Semiconductor Transaction Analysis before voting to approve the Transaction, and thus knowing that the premium Emulex's stockholders would receive paled in comparison to the premiums stockholders had received in connection with similar transactions in recent years, the Defendants nonetheless misleadingly touted the premium to Emulex's stockholders in the Recommendation Statement Indeed, the Recommendation Statement states that the premium Emulex's stockholders stood to receive was one of the factors the Board believed supported its recommendation that Emulex's stockholders tender their shares in the Tender Offer. The Recommendation Statement thus creates the

materially misleading impression that the premium Emulex's stockholders received was significant, or at the very least in line with premiums obtained in similar transactions, when in reality, the premium was drastically below the premiums stockholders had received in connection with similar merger transactions in recent years.

9. For these reasons and as set forth in detail herein, Lead Plaintiff seeks to recover damages resulting from the Individual Defendants' violations of the Exchange Act.

JURISDICTION AND VENUE

10. The claims asserted herein arise under Sections 14(d),14(e), and 20(a) of the Exchange Act, 15 U.S.C. §78n. The Court has subject matter jurisdiction pursuant to Section 27 of the Exchange Act, 15 U.S.C. §78aa, and 28 U.S.C. §1331.

11. This Court has personal jurisdiction over all of the Defendants because each is either a corporation that conducts business in and maintains operations in this District, or is an individual who either is present in this District for jurisdictional purposes or has sufficient minimum contacts with this District so as to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

12. Venue is proper in the Central District of California under Section 27 of the Exchange Act, 15 U.S.C. §78aa, as well as pursuant to 28 U.S.C. §1391, because Emulex maintains its world headquarters in this District, each Defendant transacted business in this District, and a substantial part of the events or omissions giving rise to Lead Plaintiff's claims occurred in this District.

PARTIES

13. Lead Plaintiff held shares of common stock of Emulex at all relevant times prior to the completion of the Transaction, at which time his ownership stake in the Company was extinguished for the inadequate Merger Consideration. Lead Plaintiff is a citizen of Wisconsin.

14. Defendant Emulex is incorporated under the laws of Delaware and maintains its world headquarters and principles executive offices in Costa Mesa, California. Emulex provides converged networking solutions for data centers. The Company's product portfolio consists of storage adapters, network interface cards, encrypting adapters, controller chips, server management chips, embedded bridges, switches and routers, and connectivity management software. The Company's common stock was listed on the New York Stock Exchange under the symbol "ELX" until the Transaction was consummated.

15. Defendant Bruce C. Edwards ("Edwards") served as a director of Emulex from May 2000 and as Chairman of the Board since March 2014 through the date the Transaction was consummated. Edwards was also Chairman of the Compensation Committee of the Board. Edwards is a citizen of California.

16. Defendant Jeffrey W. Benck ("Benck") served as a director, Chief Executive Officer and President of Emulex until the date the Transaction was consummated. Benck joined Emulex in August 2010 as Executive Vice President and Chief Operating Officer and was subsequently appointed as President and Chief Operating Officer in August 2010. Benck was named a director of Emulex and President and

Chief Executive Officer of the Company in July 2013. Benck is a citizen of California.

17. Defendant Gregory S. Clark ("Clark") served as a director of Emulex from April 2013 through the date the Transaction was consummated. Clark is a citizen of California.

18. Defendant Gary J. Daichendt ("Daichendt") served as a director of Emulex from February 2014 through the date the Transaction was consummated. Daichendt is also a member of the board of directors of Juniper Networks, Inc. ("Juniper Networks"), along with Individual Defendant Rahul N. Merchant. Daichendt is a citizen of California.

19. Defendant Paul F. Folino ("Folino") served as director of Emulex through the date the Transaction was consummated. Folino joined Emulex in May 1993 as President, Chief Executive Officer and director. Folino was appointed Chairman of the Board in July 2002 and was subsequently appointed to the office of Executive Chairman of Emulex and Chairman of the Board of Directors in September 2006. Folino is a citizen of California.

20. Defendant Beatriz V. Infante ("Infante") served as a director of Emulex from May 2012 through the date the Transaction was consummated. Infante is a citizen of California.

21. Defendant John A. Kelley ("Kelley") was a director of Emulex at all relevant times through the date the Transaction was consummated. Kelley is a citizen of Colorado.

22. Defendant Rahul N. Merchant ("Merchant") served as a director of Emulex from February 2014 through the date the Transaction was consummated. Merchant is also a member of the board of directors of

Juniper Networks. Merchant is a citizen of New Jersey.

23. Defendant Nersi Nazari ("Nazari") served as a director of Emulex from June 2011 through the date the Transaction was consummated. Nazari is a citizen of California.

24. Defendant Dean A. Yoost ("Yoost") served as a director of Emulex from August 2005 through the date the Transaction was consummated. Yoost is a citizen of California.

25. Defendant Avago is incorporated under the laws of Delaware and maintains its principle executive offices at 350 West Trimble Road, San Jose, California 95131.

26. Defendant Merger Sub is a Delaware corporation and a wholly-owned subsidiary of Avago, and was created for purposes of effectuating the Transaction.

CLASS ACTION ALLEGATIONS

27. Lead Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, individually and on behalf of the other former public stockholders of Emulex who were harmed by Defendants' actions described herein (the "Class"). The Class specifically excludes Defendants herein, and any person, firm, trust, corporation or other entity related to, or affiliated with, any of the Defendants.

28. This action is properly maintainable as a class action.

29. The Class is so numerous that joinder of all members is impracticable. As of January 21, 2015 Emulex had in excess of 71 million shares of common stock outstanding. Members of the Class are

dispersed throughout the United States and are so numerous that it is impracticable to bring them all before this Court.

30. Questions of law and fact exist that are common to the Class and predominate over any questions affecting only individual Class members, including, among others:

(a) whether the Defendants have violated Sections 14(d)(4) , 14(e) and 20(a) of the Exchange Act in connection with the Transaction; and

(b) whether Lead Plaintiff and the other members of the Class were harmed by the actions of Defendants complained of herein.

31. Lead Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. Lead Plaintiff's claims are typical of the claims of the other members of the Class and Lead Plaintiff has the same interests as the other members of the Class. Accordingly, Lead Plaintiff is an adequate representative of the Class and will fairly and adequately protect the interests of the Class.

32. The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for Defendants, or adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or

substantially impair or impede their ability to protect their interests.

33. Defendants have acted, or refused to act, on grounds generally applicable and causing injury to the Class, rendering final injunctive relief or corresponding declaration relief appropriate with respect the Class as a whole.

34. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Lead Plaintiffs and Class members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendants' liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

SUBSTANTIVE ALLEGATIONS

A. Emulex's Background & Recent Financial Performance

35. Founded in 1979 and headquartered in Costa Mesa, California, Emulex is a leader in network connectivity, monitoring and management solutions for global networks that support enterprise, cloud,

government and telecommunications. Emulex provides connectivity, monitoring and management solutions for high-performance networks, delivering provisioning, end-to-end application visibility, optimization and acceleration for the next generation of software-defined, telco and Web-scale data centers. The Company's I/O connectivity portfolio, which has been designed into server and storage solutions from leading OEMs and ODMs worldwide, enables organizations to manage bandwidth, latency, security and virtualization. The Emulex network visibility portfolio enables global organizations to monitor and improve application and network performance management. Emulex sells its products to original equipment manufacturers, original design manufacturers, and end users, as well as through various distribution channels, including value added resellers, systems integrators, industrial distributors, direct market resellers, and other resellers.

36. The Company is a leading supplier of fiber-channel and related products selling primarily into server and enterprise storage OEM's. Emulex's fiber-channel business is considered to be very sustainable, and potential competitors face significant barriers to entry into the market. Accordingly, Emulex is likely to maintain its stronghold on the relevant market, which is expected to continue to grow.

37. Recognizing Emulex's intrinsic value and strong prospects for long-term growth, one of its competitors, Broadcom Corporation, submitted an $11 per share bid for the Company in 2009. The members of the Emulex board at that time, which included Individual Defendants Bruce C. Edwards, Paul F. Folino, and Dean A. Yoost, rejected Broadcom's offer on July 9, 2009.

38. In its July 2009 press release announcing its rejection of the Broadcom offer, Emulex stated that Broadcom's offer "significantly undervalue[d] Emulex's long-term prospects, [was] inadequate, and [was] not in the best interests of Emulex and its stockholders."

39. The Company's decision to reject the Broadcom bid, which was $3 or 37.5% higher than the $8 per share offer the Board accepted in connection with the Transaction, was heavily criticized by many of the Company's stockholders, including activist hedge-funds with significant holdings.

40. On December 5, 2012, Emulex announced its intent to acquire Endace Limited ("Endace"), a New Zealand company that specialized in network performance management, for $130 million.

41. The members of the Emulex board and/or management that approved the Endace acquisition included Individual Defendants Bruce C. Edwards, Jeffrey W. Benck, Paul F. Folino, Beatriz V. Infante, Nersi Nazari, and Dean A. Yoost.

42. The Company's decision to purchase Endace was heavily criticized by many of the Company's stockholders, including activist hedge-funds with significant holdings.

43. For example, Elliott Associates, L.P. and certain affiliated entities (together, "Elliott"), one of the Company's largest stockholders, stated that the Company should not waste its money on what it considered to be a pointless acquisition. And Altai Capital Management, L.P. (Altai Capital"), another of the Company's largest stockholders, stated that it was "perplexed by the Company's recent announcement to acquire Endace ... We would have

preferred that Emulex use 2 its strong net cash balance to continue to repurchase its undervalued shares."[2]

44. Despite the heavy criticism, Emulex completed its acquisition of Endace on April 1, 2013.

45. In November 2013, Emulex embarked on a strategic restructuring initiative to maximize stockholder value by cutting costs, refocusing the Company's product lines and implementing a major stock repurchase. Since then, Emulex has introduced well-received products and product enhancements. The price of the Company's stock dipped in late April 2014 following revenue and earnings below analysts' expectations in the third quarter of the Company's fiscal year 2014 due, in part, to restructuring costs. However, by January 2015, the price of Emulex stock had recovered nearly all of the value lost in mid-2014.

46. Emulex announced impressive financial results during the fiscal quarters preceding the consummation of the Transaction, which caused its stock price to increase by approximately 42% between October 2014 and the time the Transaction was announced in late-February 2015, as reflected by the graph below:

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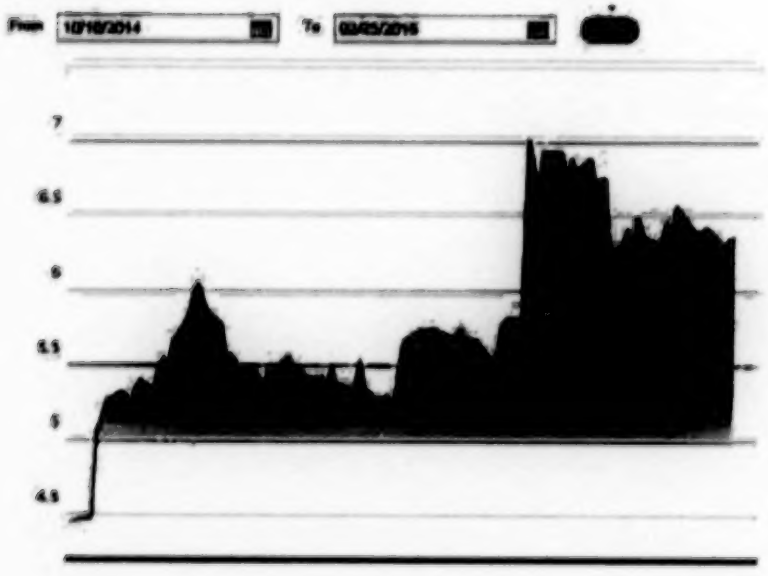
[2] Chris Mellor, *Boardroom brouhahah brewing at Emulex after Endace buy*, The Register (Apr. 2, 2013), http://www.theregister.co.uk/2013/04/02/emulex_elliott/ (last visited Sept. 11, 2015).



47. On October 30, 2014, the Company announced the following impressive results for the first quarter of 2015: Total revenue was $104 million, up 4% sequentially and **above the $93 million to $99 million initial guidance range** provided during the Company's fiscal fourth quarter earnings call, driven by strength in Network and Storage Connectivity Products; non-GAAP diluted earnings of $0.14 and a GAAP loss of $0.01 per share as compared to guidance of $0.07 - $0.11 on a non-GAAP basis and a $0.07 - $0.11 loss on a GAAP basis; non-GAAP operating income of $13 million, up 90% versus the prior quarter, reflecting stronger revenue performance, consistent non-GAAP gross margin, and operational discipline; and $21 million in cash from operations in the quarter with an ending cash, cash equivalents, and investments balance of $174 million.

48. Commenting on the strong first quarter results, Individual Defendant Benck stated:

> We entered our fiscal 2015 on strong footing, with solid performance across multiple categories including our Ethernet and Fibre Channel products, **allowing us to outperform versus expectations...** Over the past forty-five days we have launched an **unprecedented** number of OEM and ODM design wins for our Connectivity products, designed to meet the performance requirements of Grantley-based servers, with more to come. We look forward to seeing these enterprise products ramp in the market over the coming year.

(emphasis added).

49. Most recently, on January 29, 2015, the Company announced the following impressive results for the second quarter of 2015: Total revenue was $111 million, **above the high end of the initial guidance range**, aided by strong sequential and year-on-year growth in Gen 5 (16Gb) Fibre Channel products; non-GAAP diluted earnings of $0.24, up 14% year-on-year, and GAAP earnings of $0.06 as compared to a prior year loss of $0.05, **both above their respective initial guidance range**; and non-GAAP operating margin of 18%, up 130 basis points year-on-year and 560 basis points sequentially, with GAAP operating income of $8 million as compared to an operating loss of $2 million in the prior year and operating income of $1 million in the prior quarter.

50. Commenting on the strong second quarter results, Individual Defendant Benck stated:

> The second quarter demonstrated continued progress with initiatives put in place at Emulex over the last 18 months, including the delivery of the broadest set of new Ethernet and Fibre Channel products in the Company's history, increased focus on execution, and a greater emphasis on fiscal discipline... Coupled with healthy demand for our Fibre Channel portfolio and share gains aided by accelerating adoption of our latest Gen 5 Fibre Channel products, **we again exceeded the high end of our initial revenue and earnings guidance.**

(emphasis added).

51. In sum, Emulex showed significant signs of growth during the quarters preceding the completion of the Transaction, exceeding management's revenue and earnings guidance. Despite the Company's strong financial prospects, the Board agreed to abruptly sell the Company at a price below its intrinsic value, to the detriment of Emulex's common stockholders.

B. The Transaction Undervalued Emulex Shares

52. On February 25, 2015, Emulex and Avago issued a joint press release announcing that they had entered into the Merger Agreement.

53. The $8.00 per share Merger Consideration that Emulex's public stockholders received was insufficient, as it failed to adequately account for the Company's strong financial prospects and the tremendous benefits Avago will reap from the Merger.

54. Indeed, analysts from *The Street*, a leading digital financial media company, recently reported that Emulex's strengths prior to the completion of the

Transaction could be seen in multiple areas, such as its increase in net income, good cash flow from operations and growth in earnings per share. The article went on to state that the Company's net income growth for the second quarter compared to the same quarter the previous year had significantly exceeded that of the S&P 500 and the communications equipment industry. The Company's net income increased by 80.3% when compared to the same quarter one year prior. The article further stated that the Company's net operating cash flow has significantly increased by 319.52% to $20.85 million when compared to the same quarter last year. In addition, the Company vastly surpassed the industry average cash flow growth rate.

55. Another article published by investor news service Zacks on February 12, 2015 identified Emulex as a "company that looks well positioned for solid gain, but has been overlooked by investors lately." The article went on to state that "this Computer Networks stock has actually seen estimates rise over the past month for the current fiscal year by about 38.9%. But that is not yet reflected in its price, as the stock lost 9.6% over the same time frame."[3]

56. Further, analysts from DA. Davidson & Co., Piper Jaffray, and BMO Capital Markets had each issued price targets above the $8.00 per share Merger Consideration within the twelve months preceding the announcement of the Transaction; D.A. Davidson and Piper Jaffray had each issued price targets of

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[3] *Should Emulex (ELX) Be On Your Radar Now?*, Zacks Equity Research (February 12, 2015), http://www.zacks.com/stock/news/164117/should-emulex-elx-be-on-your-radar-now (last visited Sept. 11, 2015).

$10.00 per share, 25% above the Merger Consideration.

57. And on September 16, 2013, Starboard Value LP ("Starboard"), one of Emulex's largest stockholders, conducted a detailed financial analysis of the Company and concluded that the Company was "extremely undervalued" when its shares were trading at approximately $7.85 per share, a mere 15 cents below the $8.00 per share Merger Consideration Emulex's stockholders ultimately received.

58. Additionally, Avago stated that the Transaction will be immediately accretive to earnings per share on a non-GAAP basis, and that it expects Emulex businesses to contribute approximately $250 million to $300 million in annual net revenue with improved operating margins beginning in fiscal year 2016.

59. In sum, Avago will capitalize on Emulex's significant prospects for future growth and profits, and has deprived the Company's stockholders of the ability to maintain equity in the post-Merger company without fairly compensating them for their Emulex shares.

C. Activist Hedge Fund Stockholders Threaten to Remove Directors and Push for a Quick Sale of the Company

60. The Emulex Board and management faced mounting pressure to sell the Company beginning in the fall of 2012, when Elliott acquired approximately 10% of the Company's outstanding shares. Elliott acquired most of its Emulex shares at prices significantly below the $8.00 per share Merger Consideration.

61. Elliott's reputation for pressuring boards to sell companies was undoubtedly well known to the Emulex Board. In 2010 Elliott pushed Novell Inc. to sell itself, and in 2012 Elliott pressed BMC Software Inc. for several months to consider a sale, resulting in a $1 billion share buyback. Elliott also previously amassed a stake in Brocade Communications Systems Inc., and a year later the company's CEO was forced to step down after trying to sell the company for more 4 than two years.[4]

62. Elliot used its influence as Emulex's largest stockholder to pressure the Company to add two of its hand-picked directors to the Board. Caving to the pressure, on March 27, 2013, the Board increased its size to 11 members and chose Eugene J. Frantz ("Frantz") and Individual Defendant Gregory S. Clark to fill the two vacancies that were created. The Board appointed each of Messrs. Frantz and Clark to serve as members of the Nominating/Corporate Governance Committee of the Board.

63. On March 27, 2013, the Company also entered into a letter agreement with Elliott. Among other things, the letter agreement limited Elliott's ownership of Company common stock to 15%, and precluded Elliott proxy contest activities and proposals for the sale or merger of the Company until March 2014 generally, and until August 2013 for proxy contests and certain other transactions as set forth in the letter agreement. The letter agreement

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[4] Serena Saitto, *Activist Investor Elliott Boosts Stake in Emulex to 11%*, Bloomberg Business (Dec. 14, 2012) http://www.bloomberg.com/news/articles/2012-12-14/activist-investor-elliott-increases-stake-in-emulex-to-11- (last visited Sept. 11, 2015).

also restricted changes in the Company's Board committee structure as applicable to Messrs. Frantz or Clark.

64. Clark and Frantz were both members of the Board throughout the Company's poorly run sale process,[5] and thus influenced the Board's decision making process. As Elliott's hand-picked directors, Clark and Frantz undoubtedly sought to advance the interests of Elliott, which, for the reasons discussed below, were not aligned with the interests of Lead Plaintiff and Emulex's other public stockholders.

65. On May 7, 2013, another activist hedge fund, Altai Capital, which owned approximately 5.4% of Emulex's common stock, sent a letter to Emulex's CEO, pressuring the Company to initiate a sale process and engage financial advisors immediately to undertake the process. Altai Capital acquired most of its Emulex shares at prices significantly below the $8.00 per share Merger Consideration. In the letter, Altai Capital further stated that absent a sale of the entire Company, it would only be satisfied **"in the event of wholesale change at the Board level," and suggested replacing the Board members who had rejected Broadcom's $11 per share bid for Emulex and those who oversaw the Company's purchase of Endace.**[6] Such Board

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[5] Frantz did not stand for re-election at the Company's annual meeting on February 18, 2015, and thus did not vote to approve the Merger Agreement on February 25, 2015. However, he maintained his seat on the Board through February 18, 2015, and thus served on the Board throughout nearly the entire sale process.

[6] Press Release, Altai Capital Management, L.P., Altai Capital Management Delivers Letter to Emulex Coporation

members included Individual Defendants Bruce C. Edwards, Jeffrey W. Benck, Paul F. Folino, Beatriz V. Infante, Nersi Nazari, and Dean A. Yoost. Thus, Altai Capital had put six of the ten directors that voted to approve the Transaction on notice that if they did not sell the Company, Altai Capital would seek to remove them from the Board.

66. On September 16, 2013, Starboard, one of the largest stockholders of Emulex at the time, with a beneficial ownership of approximately 7.9% of the Company's outstanding common stock, sent a letter to Individual Defendant Benck and the Company's Board, stating that based on its extensive research and analysis, the Company was "extremely undervalued" when its shares were trading at approximately $7.85 per share. Starboard acquired most of its Emulex shares at prices significantly below the $8.00 per share Merger Consideration.

67. In the same letter, Starboard stated:

> As a result of this historical track record, we believe that shareholders are skeptical of management's ability to properly allocate capital and manage expenses... While we recognize the Company has recently made a management change, it is unclear at this juncture whether the strategy going forward will be materially different from the past... **Also troubling is that the composition of the Board has remained stagnant with**

Outlining Recommendations for Potential Value Creation (May 7, 2013), *available at* http://www.businesswire.com/news home/20130507006933/en/Altai-Capital-Management-Delivers-Letter-Emulex- Corporation#.VfBSSrmFOUk (last visited Sept. 11, 2015).

> **little change despite dismal performance.** Apart from the addition of two new independent directors at the request of your largest shareholder earlier this year, **the remainder of the Board is composed primarily of long-time directors, who collectively have an average tenure on the Board of over 15 years.** Further, instead of implementing corporate governance best practices by having former CEOs step down from the Board upon their resignation as CEO, Emulex has made a terrible habit of allowing former CEOs to remain on the Board. In fact, the current Chairman is the former CEO, and the former Chairman, who remains on the Board, is a former CEO who served from 1993-2006... **It is time for a significant change at Emulex.** Specific changes must be made to address years of dismal operating and share price performance as well as sub-optimal corporate governance. **We believe a newly reconstituted Board comprised of independent directors** and shareholder advocates should be able to evaluate each of Emulex's businesses with a fresh perspective and determine the right 7 strategy to enhance shareholder value.[7]

68. Accordingly, just like Altai Capital, Starboard made it clear that it would actively seek to

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[7] Press Release, Starboard Value LP, Starboard Delivers Letter to Emulex CEO and Board of Directors (Sept. 16, 2013), *available at* http://www.prnewswire.com/news-releases/starboard-delivers-letter-to-emulex-ceo-and-board-of-directors-223943781.html (last visited Sept. 11, 2015).

completely revamp the composition of the Board, and thus have certain of the Individual Defendants removed, if significant changes to the Company's operations were not implemented.

69. In September 2013, Emulex announced that its Chief Financial Officer Michael J. Rockenbach ("Rockenbach") would resign at the end of the year. Rockenabach's resignation was driven by pressure from Elliott, Altai Capital, and Starboard.

70. In November 2013, under pressure from Elliott, Emulex announced that its Executive Chairman and former CEO, James McCluney, would step down from his position and not seek re-election.

71. Thus, by the fall of 2013, at least three of the Company's largest stockholders, each with significant financial resources and the ability to influence other stockholders, had sent a resoundingly clear message to the Board – they could either sell the Company, or face the embarrassment and stigma of losing their jobs for poor performance.

72. But the interests of Elliott, Altai Capital and Starboard were not aligned with Emulex's other public stockholders because each of the firms acquired a significant portion of their Emulex shares below the $8.00 per share Merger Consideration, and their primary goal was to quickly return cash to their investors rather than invest in the Company long-term. Hedge Funds such as Elliott, Altai Capital and Starboard are willing to liquidate their shares even in strong and viable companies because of their limited resources and the need to manage other portfolio firms. Hedge funds also seek to avoid situations in which an entity is profitable, but requires ongoing monitoring and where growth opportunities and

prospects for exit are not high enough to generate an attractive enough internal rate of return. Such companies are routinely liquidated via sales to larger companies for cash, allowing hedge funds to quickly exit on their investment and turn their efforts and attention to new ventures. Indeed, as one writer covering the industry wrote upon the news that Elliott had increased its stake in Emulex back in the fall and winter of 2012, "Elliott is Emulex's largest shareholder and, we surmise, will want to make a profit on that cash, a quick profit - a profit inside 12 months we'd say."[8]

D. The Board Caves to Activist Investor Pressure and Decides to Quickly Sell the Company, Enabling Them to Avoid the Embarrassment of Losing Their Jobs

73. The pressure exerted on the Board by Elliott, Altai Capital and Starboard undoubtedly influenced the Company's strategic review process. Indeed, Elliott had been able to exert its will to force certain Emulex officers and directors to resign and replace them with its own hand-picked directors, and the Board specifically authorized certain parties interested in acquiring Emulex to speak directly with representatives of Elliott. Recommendation Statement at 16. Further, according to its September 13, 2013 letter, representatives of Starboard were

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[8] Chris Mellor, *Bolshy investor sinks teeth into weakened Emulex, tears off another chunk*, The Register (Dec. 14, 2012), http://www.theregister.co.uk/2012/12/14/emulex_elliott/ (last visited Sept. 11, 2015).

given access to Emulex's senior management in order to research the Company's value.

74. Succumbing to the pressure exerted by Elliott, Altai Capital and Starboard, the Board retained Goldman Sachs to conduct a sale process in May 2013. *Id.* at 14. Goldman Sachs had previously worked for Avago and received lucrative fees in connection with serving as an underwriter and co-manager in connection with Avago's initial public offering in 2009, and two secondary offerings in 2010. Goldman Sachs' prior relationship with Avago may have materially influenced Emulex's strategic review process and improperly tainted the sale process toward a deal with Avago.

75. News that Emulex had hired a banker to sell the Company leaked to the public in July 2013. Accordingly, prospective bidders were put on notice that the Board was eager to sell the Company, which undoubtedly impacted the value of the offers that were ultimately received. Indeed, interested parties surely sensed that they could acquire Emulex at a discount given the pressure the Board faced to sell the Company.

76. After purportedly suspending the sale process on a temporary basis in November 2013, the Board decided to recommence the process in or around May 2014. *Id.* at 17.

77. The sale process that purportedly occurred after the Board's May 20, 2014 meeting was poorly run and designed to finalize a sale of the Company as quickly as possible rather than maximize stockholder value or even obtain fair value for the Company.

78. After receiving two drastically inadequate proposals to acquire the Company from two private

equity firms sometime between May and August 2014, the Board directed management to contact two operating companies, Avago and another unidentified company referred to in the Recommendation Statement as "Company A", to determine their interest in acquiring Emulex. *Id.*

79. Operating companies, as opposed to private equity firms, were much more likely to submit higher proposals to acquire the Company, because unlike private equity firms, they are able to obtain value in a merger as a result of obtaining significant synergies. Yet, after recommencing the sale process, the Board initially only authorized Goldman Sachs and management to contact two operating companies, one of which was Avago.

80. On August 23, 2014, a representative of Goldman Sachs contacted a representative of Avago to determine if Avago would be interested in exploring a strategic transaction involving Emulex. *Id.* On August 24, 2014, a representative of Avago expressed an interest in having a meeting to discuss Emulex's business. *Id.* Emulex entered into a confidentiality agreement with Avago on August 28, 2014 and thereafter Emulex made nonpublic information available to Avago. *Id.*

81. Representatives of Emulex made presentations to representatives of Avago on September 4, 18 and 19, 2014 and continued to make nonpublic information regarding Emulex available to Avago, including internal financial forecasts prepared by management regarding the anticipated future financial and operating performance of Emulex for the years 2015 through 2017. *Id.* Individual Defendant Benck met with Avago's CEO to discuss Emulex and its business on September 18, 2014. *Id.*

However, on September 30, 2014, representatives of Avago purportedly informed a representative of Emulex that it was not interested in further pursuing a potential strategic transaction involving Emulex at that time. *Id.*

82. On October 29, 2014, a representative of Company A purportedly informed a representative of Emulex that it was not interested in pursuing a possible strategic transaction involving Emulex. *Id.*

83. On January 7, 2015, a representative of Avago contacted Individual Defendant Benck to discuss Avago's possible renewed interest in Emulex and set up a subsequent meeting on January 14, 2015. *Id.* at 18.

84. Individual Defendant Benck and another member of Company management attended the January 14 meeting, along with Avago's CEO and other representatives. *Id.* During the meeting, the Emulex representatives described progress in Emulex's business since the fall of 2014 and preliminary financial results for the first half of its current fiscal year. *Id.* The Emulex representatives also provided Avago with an updated revenue forecast for certain of Emulex's business segments. *Id.*

85. Thereafter, on January 26, 2015, Avago submitted a written proposal to acquire Emulex at a price of $7.50 per share in cash. *Id.* Avago indicated that it believed that it was in the interest of both Emulex and Avago that any transaction be **negotiated quickly**. *Id.* Accordingly, a representative of Avago informed Emulex that its proposal was subject to using the material terms of a merger agreement Avago had recently used in

connection with another merger. Avago also requested a 45-day period of exclusivity. *Id.*

86. At the Board meeting immediately after Avago submitted its proposal to acquire Emulex for $7.50 per share, held on January 31, 2015, Emulex management presented to the Board an updated financial forecast for the second half of fiscal years 2015 through 2019 (the "Revised Downward Forecast"). *Id.* Emulex Management had previously prepared a financial forecast for fiscal years 2015 through 2017 in May 2014 (the "May 2014 Forecast"). *Id.* at 39. **Yet, at or around the same time it received Emulex's $7.50 offer, Emulex management suddenly decided that it needed to revise its May 2014 Forecast significantly downward.**

87. Specifically, the May 2014 Forecast was revised downward with the following changes: while the May 2014 Forecast had projected revenues of $420.1 million and $437.7 million in fiscal years 2016 and 2017, respectively, the Revised Downward Forecast projected revenues of $401.6 million and $423.4 million in fiscal years 2016 and 2017, respectively (*id.* at 39-40); while the May 2014 Forecast had projected Non-GAAP net income of $49.6 million, $56.7 million and $61.7 million in fiscal years 2015 through 2017, respectively, the Revised Downward Forecast projected Non-GAAP net income of $48.5 million, $43.0 million and $54.5 million in fiscal years 2015 through 2017, respectively, *id.*; and while the May 2014 Forecast had projected EBITDA of $76.3 million, $82.1 million and $87.6 million in fiscal years 2015 through 2017, respectively, the Revised Downward Forecast projected EBITDA of

$74.4 million, $65.9 million, and $78.9 million in fiscal years 2015 through 2017, respectively, *id.*

88. Further, while the Revised Downward Forecast contained unlevered free cash flow projections, the Recommendation Statement curiously omitted the unlevered free cash flow projections from the May 2014. *Id.* Accordingly, Emulex's stockholders were deprived of the ability to determine how management's downward revisions to the Company's financial projections impacted the Company's projected unlevered free cash flows.

89. The downward adjustments to management's projections had a significant negative impact on the Company's valuation and the implied values per share Goldman Sachs calculated in connection with the various financial analyses it performed to support its fairness opinion.

90. It is currently unclear if management's decision to suddenly revise the projections from the May 2014 Forecast drastically downward, which was made around the same time it received Avago's offer, was warranted by the Company's actual business performance and prospects, or a desire to make Avago's offers appear more fair to the Company's stockholders.

91. The Board met on January 31, 2015 to review Avago's January 26th offer to acquire Emulex for $7.50 per share. *Id.* at 18. Representatives of Goldman Sachs participated in the meeting. *Id.* The representatives of Goldman Sachs reviewed Goldman Sachs' preliminary observations regarding Avago's proposal and made a presentation including a preliminary financial analyses of the proposal. *Id.*

92. The Board determined that management should continue discussions with representatives of Avago, and purportedly directed Individual Defendant Benck to continue to work closely with the Chairman of the Board to determine the best negotiating approach. *Id.* While the Board did not determine whether to accept exclusivity as a condition to proceeding with discussions with Avago at the January 31st meeting, management was directed to leave the possibility open. *Id.*

93. During the course of the next week, Benck purportedly conducted price discussions with a representative of Avago, during which Beck initially proposed a price of $8.50 in cash per share, to which the Avago representative responded with their final $8.00 per share offer on February 5, 2015. *Id.* at 19.

94. Avago continued to demand that the parties finalize the Transaction as quickly as possible. *Id.* Avago's February 5th proposal reiterated the request for exclusivity and the condition that a transaction be based on the merger agreement Avago had used in connection with a recent merger in order to finalize an agreement quickly. *Id.* Specifically, a representative of Avago advised Individual Defendant Benck that Avago's proposal was based on the expectation that a definitive agreement **would be executed by late February** to facilitate an announcement in conjunction with Avago's first quarter earnings. *Id.* Representatives of Avago also stated that if the parties were unable to execute a merger agreement prior to Avago's release of first quarter earnings, the deal would likely fall apart and Avago would turn its attention to other projects. *Id.*

95. On February 7, 2015, the Board, along with representative of Goldman Sachs, met to consider

Avago's most recent proposal. *Id.* The Board purportedly determined that private equity firms would not be able to submit a competitive bid. *Id.* The Board then purportedly reviewed four possible additional strategic bidders, referred to in the Recommendation Statement as "Company A", "Company B", "Company C", and "Company D". *Id.* The Board quickly dismissed each of the four candidates, and determined that none of them were worth even contacting. *Id.* Simply put, the Board sensed a deal with Avago could be finalized quickly, and was prepared to get the deal done without so much as bothering to contact any other strategic bidders. *Id.* The Board then directed Emulex management to finalize discussions with Avago and gave management permission to enter into a 30-day exclusivity agreement. *Id.*

96. However, on February 10, 2015, Avago suddenly dropped its request for exclusivity. *Id.* Sometime between February 10 and February 20, representatives of Goldman Sachs purportedly contacted two of the strategic bidders that they had just three days earlier purportedly determined were not viable merger candidates, Company B and Company D. *Id.* at 20. Company B had purportedly initially agreed to consider the possibility of acquiring Emulex, but then ultimately stated that it would not be able to consider the matter at the present time. *Id.* Company D also purportedly told Goldman Sachs that it was still considering the matter. *Id.*

97. Eager to finalize a deal with Avago within the tight time constrains Avago had set, the representatives of Company B and Company D were likely advised by either Goldman Sachs or Emulex that the timeframe they would have to complete

diligence and submit a bid was tight. Given that Company B and Company D were first contacted sometime on or after February 10, 2015, and that the Board voted to approve the Transaction on February 25, 2015, the Board's decision to allow Goldman Sachs to contact Company B and Company D was likely driven more by a desire to create the false impression that an adequate sale process had been conducted, rather than actually eliciting bids from them. Indeed, no reasonable company could complete the diligence necessary to submit a bid within such a tight and unreasonably short time frame.

98. On February 17, 2015, Individual Defendant Benck informed the Board that Avago's CEO had requested a meeting with him on February 20, 2015. *Id.* The Board authorized Benck to attend. *Id.*

99. On February 21, 2015, the Board was informed that Avago would require each of them and Emulex's named executive officers to sign a tender and support agreement in which they would agree to tender their shares not to solicit alternative transactions. *Id.*

100. Also on February 21, 2015, Benck advised the Board that he had met with Avago's CEO on February 20, and that during their meeting, they discussed the possibility of Benck continuing as manager of the Emulex business unit within Avago once the parties finalized the deal. *Id.* at 21. It is currently unknown whether Benck maintained a position with Avago after the Transaction closed, but the opportunity to do so clearly created a conflict of interest.

101. During the February 21 Board meeting, a representative of Goldman Sachs led an extensive discussion of its analysis of the Transaction from a

financial point of view, which included reviewing various analyses Goldman Sachs had performed concerning the fairness of the $8.00 per share Merger Consideration. *Id.* The Goldman Sachs representative also specifically touted the premiums the $8.00 Merger Consideration represented compared to Emulex's closing trading price the previous day and to Emulex's 90-day trading average price. *Id.*

102. The Board then determined that Emulex should seek to finalize the Merger Agreement, despite the fact that Company D had stated that it was still considering submitting a bid. *Id.*

103. On February 25, 2015, the Board held a special meeting to vote on the Merger Agreement and approve the Transaction. *Id.* During the meeting, Goldman Sachs informed the Board that a representative of Company D had purportedly informed Goldman Sachs that it was not interested in pursuing a strategic transaction with Emulex. *Id.* at 22. Representatives of Goldman Sachs then provided their analysis of the Transaction. *Id.* At the conclusion of the presentation made by Goldman Sachs, which included several analyses concerning the fairness of the Merger Consideration including a "Precedent Transactions Analysis" or "Premium Analysis" slide entitled *Selected Semiconductor Transactions*, a Goldman Sachs representative presented its oral opinion that the $8.00 per share Merger Consideration was fair to Emulex's stockholders. *See id.* The Board then voted to approve the Merger Agreement. *Id.*

104. In sum, caving to activist hedge fund investor pressure, the Board oversaw a poorly run sale process between May 2014 and February 2015, during which

the goal was to sell the Company to the first bidder that presented anything close to a justifiably acceptable bid. Indeed, **only one other strategic company besides Avago was even contacted prior to February 10, 2015**.

105. The Board then purportedly authorized Goldman Sachs to contact two other strategic parties sometime between February 10, 2015 and February 21, 2015, but by that time Avago had already conducted significant diligence and submitted a bid. Thus, the purported overtures Goldman Sachs made to Company B and Company D were nothing more than poorly veiled attempts to create the impression that the Board had conducted some form of a legitimate sale process. In reality, the Individual Defendants were eager to finalize a deal with Avago as quickly as possible, enabling them to appease the activist hedge-fund investors and end their tenures with the Company cleanly.

E. The Individual Defendants Reap Personal Financial Gain From the Transaction

106. Beginning in May 2014, approximately the same time the Board decided to recommence the sale process and thus realized that a sale of the Company for some premium to the then-current stock price was imminent, certain of the Individual Defendants began to acquire significant amounts of Emulex common stock at prices well below the $8.00 per share Merger Consideration.

107. On May 6, 2014, Individual Defendant Daichendt purchased 200,000 Emulex common

shares at a price of $4.70 per share.[9] Prior to that date, Daichendt had only owned 27,100 Emulex common shares, and he thus significantly increased his ownership stake in the Company.

108. On May 6, 2014, Individual Defendant Edwards purchased 10,000 Emulex common shares at a price of $4.67 per share, and 10,000 Emulex common shares at a price of $4.68 per share.[10] Prior to that date, Edwards had only owned 92,360 Emulex common shares, and he thus increased his ownership stake by approximately 22%.

109. On May 7, 2014, Individual Defendant Yoost purchased 8,282 Emulex common shares at a purchase price of $5.00 per share.[11] Prior to that date, Yoost had owned approximately 91,000 Emulex common shares, and he thus increased his ownership stake by approximately 9%.

110. Accordingly, Individual Defendants Daichendt, Yoost and Edwards each increased their ownership stakes in the Company at a time when they knew a deal was forthcoming and thus would be able to obtain a quick premium on their investment.

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[9] Emulex Corp., Statement of Changes in Beneficial Ownership (Form 4) (May 6, 2014), http://www.sec.gov/Archives/edgar/data/350917/000119529314000004/xslF345X03/edgardoc.xml (last visited Sept. 11, 2015).

[10] Emulex Corp., Statement of Changes in Beneficial Ownership (Form 4) (May 6, 2014), http://www.sec.gov/Archives/edgar/data/350917/000119529314000002/xslF345X03/edgardoc.xml (last visited Sept. 11, 2015).

[11] Emulex Corp., Statement of Changes in Beneficial Ownership (Form 4) (May 8, 2014), http://www.sec.gov/Archives/edgar/data/350917/000133715614000004/xslF345X03/edgardoc.xml (last visited Sept. 11, 2015).

111. Further, each of the Individual Defendants will receive significant amounts of compensation as a result of the Transaction by virtue of receiving the Merger Consideration in exchange for their Emulex shares.

112. Individual Defendant Benck, who assumed primary responsibility for leading the sale process and engaging in negotiations with Avago, will receive total consideration of $5,653,623 as a result of the Emulex stock he owned upon the closing of the Transaction. *Id.* at 5.

113. Benck was also eligible to receive a change in control payment of $6,374,944 if his employment was terminated upon the closing of the Transaction. *Id.* at 9.

114. Individual Defendant Clark will receive total consideration of $394,592 as a result of the Transaction. *Id.* at 6.

115. Individual Defendant Daichendt will receive total consideration of $1,866,800 as a result of the Transaction. *Id.*

116. Individual Defendant Edwards will receive $900,880 in total consideration as a result of the Transaction. *Id.*

117. Individual Defendant Folino will receive $268,256 in total consideration as a result of the Transaction. *Id.*

118. Individual Defendant Infante will receive $444,120 in total consideration as a result of the Transaction. *Id.*

119. Individual Defendant Kelley will receive $266,800 in total consideration as a result of the Transaction. *Id.*

120. Individual Defendant Merchant will receive $266,800 in total consideration as a result of the Transaction. *Id.*

121. Individual Defendant Nazari will receive $543,472 in total consideration as a result of the Transaction. *Id.*

122. Individual Defendant Yoost will receive $848,104 in total consideration as a result of the transaction. *Id.*

123. In total, the named Individual Defendants, as well as certain Company executive officers, will receive $17,200,823 in total consideration as a result of the Transaction. *Id.*

124. In sum, certain of the Individual Defendants purchased significant amounts of Emulex common stock at prices well below the Merger Consideration during the months preceding the announcement of the Transaction, knowing that a sale of the Company was imminent and that they would be able to obtain a quick, easy premium on their investment within a few months' time.

125. And each of the Individual Defendants received significant payouts by virtue of their otherwise illiquid Emulex shares being exchanged for the Merger Consideration. The Individual Defendants were happy to accept the Merger Consideration because it provided them with a graceful exit from the Company with cold, hard cash.

126. Thus, the Individual Defendants, recognizing that their only options were to quickly sell the Company or lose their Board seats, were each able to personally profit from the Transaction.

F. The Preclusive Deal Protection Devices Deterred Superior Offers

127. After caving to pressure from activist hedge fund investors to quickly sell the Company, and in order to ensure that the consummation of the Transaction was not derailed, the Individual Defendants agreed to certain deal protection provisions in the Merger Agreement that operated conjunctively to lock-up the Transaction and ensured that no competing offers for the Company would emerge.

128. First, the Merger Agreement's no solicitation provision prohibited the Company or the Individual Defendants from taking any affirmative action to obtain a better offer for the Company's stockholders. Specifically, Section 5.3 of the Merger Agreement prohibited the Company and the Individual Defendants from soliciting, initiating, encouraging or facilitating any alternative acquisition proposal.

129. Furthermore, Section 5.3 of the Merger Agreement granted Avago recurring and unlimited matching rights, which provided Avago with: (i) unfettered access to confidential, non-public information about competing proposals from third parties which it could use to prepare a matching bid; and (ii) four business days to negotiate with Emulex, amend the terms of the Merger Agreement, and make a counter-offer in the event a superior offer was received.

130. The no solicitation and matching rights provisions essentially ensured that a superior bidder did not emerge, as any potential suitor was undoubtedly deterred from expending the time, cost, and effort of making a superior proposal while

knowing that Emulex could easily foreclose a competing bid. As a result, these provisions unreasonably favored Avago, to the detriment of the Class.

131. Additionally, Section 7.2 of the Merger Agreement provided that Emulex must pay Avago a termination fee of $19.5 million in the event the Company elected to terminate the Merger Agreement to pursue a superior proposal. The termination fee, which amounted to an unreasonably high 3.2% of the Transaction's equity value, further deterred other potential suitors from making a superior offer for the Company, as any competing bidder would have had to pay a naked premium for the right to provide Emulex's stockholders with a superior offer.

132. Ultimately, these deal protection provisions restrained the Board's ability to solicit or engage in negotiations with any third party regarding a proposal to acquire all or a significant interest in the Company.

G. The Board Intentionally Omits a Critical Financial Analysis From the Recommendation Statement, Rendering Certain Statements Materially Misleading

133. The Individual Defendants, having finalized a deal with Avago that would allow them to still reap personal financial gain and leave their positions gracefully rather than suffer the embarrassment of losing their jobs for poor performance amidst continued pressure from the activist hedge-fund investors, were eager to ensure the Transaction was successfully consummated.

134. Indeed, each of the Individual Defendants received sizeable aggregate payments in exchange for their Emulex shares, and Individual Defendant Benck was also involved in discussions with Avago to keep his lucrative job with the Company after the Transaction closed.

135. Accordingly, on April 7, 2015, the Board caused the Recommendation Statement to be filed with the SEC, which stated that the Board "unanimously (1) determined that the transactions contemplated by the Merger Agreement, including the [Tender] Offer and the Merger, are fair to, and in the best interests of, Emulex and its shareholders, (2) approved and declared advisable the Merger Agreement and the Transaction, including the Offer and the Merger, and (3) recommended that Shareholders accept the Offer, tender their Shares to Purchaser in the Offer and, to the extent applicable, approve and adopt the Merger Agreement and the Merger." *Id.* at 14.

136. The Board undoubtedly presumed that its recommendation, along with Goldman Sachs' fairness opinion and the financial analyses it performed to support its opinion, would convince Emulex's stockholder to tender their shares, thereby ensuring that the Transaction would be consummated as planned.

137. There was one significant problem however – one of the financial analyses Goldman Sachs performed in reviewing the fairness of the Merger Consideration, commonly referred to as a "Precedent

Transactions Analysis" or "Premium Analysis",[12] showed that, contrary to the Board's publicly stated determination, the Merger Consideration was drastically inadequate and fundamentally unfair to Emulex's stockholders.

138. Specifically, Goldman Sachs had performed a valuation analysis, entitled "Selected Semiconductor Transactions", whereby it selected certain transactions in the industry it deemed most similar to the Transaction and reviewed the respective premiums stockholders received in those transactions compared to the target company's undisturbed stock price and 52 week high stock price. *See* Exhibit A at ELX91.

139. Goldman Sachs' Selected Semiconductor Transactions Analysis, which appeared in the presentation it made to the Board on February 25, 2015, the date the Board approved the Transaction, is depicted below:

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[12] Such an analysis is one of "[t]he most common and accepted techniques" upon which a fairness opinion can rest. Steven M. Davidoff, *Fairness Opinions*, 55 Am. U.L. Rev. 1557, 1574 (2006).

140. Goldman Sachs' Selected Semiconductor Transactions Analysis revealed that the mean and median premiums over the target company's undisturbed stock price for the selected transactions were **44.8%** and **50.8%,** respectively, and the mean and median premiums over the target company's 52 week high were **17.6%** and **14.4%,** respectively.

141. Accordingly, Goldman Sachs' Selected Semiconductor Transactions Analysis clearly indicated that the corresponding premiums that Emulex's stockholders stood to receive, **26.4%** to the closing sales price the last trading day prior to the executing of the Merger Agreement (*i.e.* the undisturbed stock price) and **4.8%** based on the 52-week high closing share price, Recommendation Statement at 22-23, were significantly below the premiums stockholders had received in comparable transactions.

142. Goldman Sachs' Selected Semiconductor Transactions Analysis was presented to the Board on February 25, 2015, the date it voted to approve the Transaction, in a presentation Goldman Sachs gave to the Board.

143. On February 21, 2015, a representative of Goldman Sachs had also specifically led an extensive discussion with the Board concerning Goldman Sachs' analysis of the Transaction from a financial point of view based on the Merger Consideration of $8.00 in cash per share, during which the representative specifically discussed the premiums the Merger Consideration represented compared to Emulex's closing trading price on the most recent trading day and to Emulex's 90-day trading average price. *Id.* at 21.

144. Because Goldman Sachs' Selected Semiconductor Transactions Analysis clearly showed that the premium Emulex's stockholders stood to receive in connection with the Transaction was significantly below the premiums obtained in comparable transactions, and that the Merger Consideration was therefore inadequate and unfair, the Board intentionally or recklessly omitted the analysis from the Recommendation Statement.

145. Indeed, the Board decided to include in the Recommendation Statement another financial analysis performed by Goldman Sachs which appeared in the same section of the February 25 fairness presentation as the Selected Semiconductor Transactions Analysis. Specifically, Goldman Sachs' Selected Public Trading Comparables Analysis, which is referred to in the Recommendation Statement as the "Selected Companies Analysis", *id.* at 27-28, appeared in the February 25 Fairness Presentation in same section where the Selected Semiconductor Transactions Analysis appeared. *See* Exhibit A at ELX87.

146. Despite knowing that the premium Emulex's stockholders stood to receive in connection with the Transaction paled in comparison to the premiums stockholders of similar companies had received in connection with recently completed comparable transactions, the Board, via the Recommendation Statement, nonetheless continued to falsely and misleadingly tout that the premium was significant and supported the Board's recommendation that Emulex's stockholders tender their shares in the Tender Offer. Recommendation Statement at 22-23.

147. Specifically, the Recommendation Statement states that "**In** approving the Merger Agreement and

the transactions contemplated thereby and **making its recommendation that Shareholders tender their Shares in the Offer**, the Board considered a number of factors, including the following, **which the Board believes support these determinations**:

Premium to Market Price: **The Board considered that the Merger Consideration of $8.00 in cash per share represented**:

- **A premium of 26.4% to the closing sales price on February 24, 2015, the last trading day prior to the execution of the Merger Agreement;**
- a premium of 24.0% based on the 30-day average of $6.45 per Share as of February 24, 2015;
- a premium of 32.9% based on the 90-day average of $6.02 per Share as of February 24, 2015;
- **a premium of 4.8% based on the 52-week high closing Share price of $7.63 per Share as of February 24, 2015;**
- a premium of 79.4% based on the 52-week low closing Share price of $4.46 per Share as of February 24, 2015; and
- a premium of 33.3% based on the Institutional Brokers' Estimate System ("IBES") median price target of $6.00 per Share on February 24, 2015.

Id. (emphasis added).

148. The Board's intentional decision to omit Goldman Sachs' Selected Semiconductor Transactions Analysis from the Recommendation Statement renders the above-referenced statement in the Recommendation Statement materially

misleading because the above-referenced statements clearly create the impression that the premiums supported the fairness of the Merger Consideration, when in reality the premiums were materially below the premiums stockholders of similar companies have received in connection with recently completed comparable transactions.

149. Defendants knowingly, or at the very least recklessly, failed to disclose the material information from Goldman Sachs' Selected Semiconductor Transactions Analysis discussed above. The omission of the information from Goldman Sachs' Selected Semiconductor Transactions Analysis was material and rendered certain portions of the Recommendation Statement that touted the premium Emulex's stockholders received in connection with the Transaction materially misleading. As a result of this material omission and the misleading statements in the Recommendation Statement, Emulex's stockholders were unable to make an informed decision concerning whether or not to tender their shares, and suffered harm as a result.

H. Defendants Knowingly or Recklessly Disregarded that the Recommendation Statement Omitted Material Information and Contained Materially False or Misleading Statements

150. The Individual Defendants, and thus Emulex, knew or recklessly disregarded that the Recommendation Statement omitted any reference to or summary of Goldman Sachs' Selected Semiconductor Transactions Analysis, and contained the materially false and misleading statements referenced-above, which state, or at the very create a

clear impression that the premium obtained in connection with the Transaction supported the fairness of the Merger Consideration to Emulex's stockholders.

151. Specifically, Defendants undoubtedly reviewed the contents of the Recommendation Statement before it was filed with the SEC. Indeed, Individual Defendant Benck has attested that he made due inquiry concerning the information set forth in the Recommendation Statement. *Id.* at 48. Individual Defendant Benck was thus aware that the Recommendation Statement omitted any reference to or summary of Goldman Sachs' Selected Semiconductor Transactions Analysis, and contained the materially false and misleading statements touting the premium Emulex's stockholders received in the Transaction, referenced-above.

152. Further, the Recommendation Statement indicates that on February 21, 2015:

> A representative of Goldman Sachs then led **an extensive discussion** of Goldman Sachs' analysis of the possible transaction from a financial point of view based on the indicated price of $8.00 in cash per Share. He noted that Goldman Sachs' preliminary analysis, based on the work undertaken to date, on the factors and assumptions described and on the forecasts of Emulex's management, indicated that the $8.00 in cash per Share was in excess of the standalone value of Emulex indicated in Goldman Sachs' analysis. He also noted that $8.00 in cash per Share represented a 25% premium to the closing trading price on February 19, 2015 and a 34% premium to the

90-day trading average price on February 19, 2015...

Id. at 21.

153. The Recommendation Statement also indicates that on February 25, 2015 Goldman Sachs provided the Board with an analysis of the Transaction and presented its oral opinion that based upon and subject to the factors and assumptions set forth therein and reviewed at the meeting, the $8.00 per share Merger Consideration was fair from a financial point of view to Emulex's stockholders. *Id.* at 22. The Recommendation Statement further indicates that the Board considered the various financial analyses presented by Goldman Sachs in connection with approving the Merger Agreement and making its recommendation that Emulex stockholders tender their shares in the Tender Offer. *Id.* at 23.

154. Goldman Sachs' Selected Semiconductor Transactions Analysis specifically appeared in the presentation it made to the Board on February 25, 2015, the date the Board approved the Transaction. Accordingly, each of the Individual Defendants undoubtedly saw and reviewed the Semiconductor Transactions Analysis on February 25, 2015, and likely at previous Board meetings during which Goldman Sachs made presentations. The Individual Defendants thus knew, or recklessly disregarded the fact that the Recommendation Statement omitted any reference to or summary of Goldman Sachs' Selected Semiconductor Transactions Analysis, and contained the materially false and misleading statements touting the premium Emulex's stockholders received in the Transaction, referenced-above.

FIRST CAUSE OF ACTION

Claim for Violations of Section 14(e) of the Exchange Act Against All Defendants

155. Lead Plaintiff repeats and realleges each allegation contained above as if fully set forth herein.

156. Section 14(e) of the Exchange Act provides that it is unlawful "for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation." 15 U.S.C. § 78n(e).

157. As discussed above, Emulex filed with the SEC and delivered the Recommendation Statement to its stockholders, which Defendants knew or recklessly disregarded contained material omissions and misstatements as set forth above.

158. During the relevant time period, Defendants disseminated the false and misleading Recommendation Statement above. Defendants knew or recklessly disregarded that the Recommendation Statement failed to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

159. The Recommendation Statement was prepared, reviewed and/or disseminated by Defendants. It misrepresented and/or omitted material facts, including material information about

the fairness of the consideration offered to Emulex stockholders via the Tender Offer.

160. In so doing, Defendants made untrue statements of material facts and omitted material facts necessary to make the statements that were made not misleading in violation of Section 14(e) of the Exchange Act. By virtue of their positions within the Company and/or roles in the process and in the preparation of the Recommendation Statement, Defendants were aware of this information and their obligation to disclose this information in the Recommendation Statement.

161. The omissions and incomplete and misleading statements in the Recommendation Statement are material in that a reasonable stockholder would consider them important in deciding whether to tender their shares or seek appraisal. In addition, a reasonable investor would view the information identified above which has been omitted from the Recommendation Statement as altering the "total mix" of information made available to stockholders.

162. Defendants knowingly or with deliberate recklessness omitted the material information identified above from the Recommendation Statement, causing certain statements therein to be materially incomplete and/or misleading. Indeed, while Defendants undoubtedly had access to and reviewed the omitted material information in connection with approving the Transaction, they allowed it to be omitted from the Recommendation Statement, rendering certain portions of the Recommendation Statement materially incomplete and misleading.

163. The misrepresentations and omissions in the Recommendation Statement are material to Lead Plaintiff and the Class, and Lead Plaintiff and the Class were deprived of their entitlement to make a fully informed decision in connection with the Tender Offer, as such misrepresentations and omissions were not corrected prior to the expiration of the Tender Offer.

164. As a direct and proximate result of the above-referenced material misstatements or omissions, Lead Plaintiff and the Class suffered significant damages.

165. Accordingly, Defendants are liable for violating Section 14(e) of the Exchange Act.

166. Lead Plaintiff and the Class are therefore entitled to recover an amount to be determined at trial.

SECOND CAUSE OF ACTION

Claim for Violations of Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9 (17 C.F.R. § 240.14d-9) Against All Defendants

167. Lead Plaintiff repeats and realleges each allegation contained above as if fully set forth herein.

168. Defendants caused the Recommendation Statement to be issued with the intention of soliciting stockholder support of the Transaction.

169. Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9 promulgated thereunder require full and complete disclosure in connection with tender offers. Specifically, Section 14(d)(4) provides that:

> Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders

> shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

170. SEC Rule 14d-9(d), which was adopted to implement Section 14(d)(4) of the Exchange Act, provides that:

> Information required in solicitation or recommendation. Any solicitation or recommendation to holders of a class of securities referred to in section 14(d)(1) of the Act with respect to a tender offer for such securities shall include the name of the person making such solicitation or recommendation and the information required by Items 1 through 8 of Schedule 14D-9 (§ 240.14d-101) or a fair and adequate summary thereof.

171. In accordance with Rule 14d-9, Item 8 of a Schedule 14D-9 requires a Company's directors to:

> Furnish such additional information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.

172. The Recommendation Statement violates Section 14(d)(4) and Rule 14d-9 because it omits material facts, including those set forth above. Moreover, Defendants knew or recklessly disregarded that the Recommendation Statement is materially misleading and omits material facts that are necessary to render them non-misleading.

173. Defendants knowingly or with deliberate recklessness allowed the material information identified above to be omitted from the Recommendation Statement, causing certain statements therein to be materially incomplete and misleading. Indeed, while Defendants undoubtedly had access to and reviewed the omitted material information in connection with approving the Transaction, they allowed it to be omitted from the Recommendation Statement, rendering certain portions of the Recommendation Statement materially incomplete and misleading.

174. The misrepresentations and omissions in the Recommendation Statement are material to Lead Plaintiff and the Class, and Plaintiff and the Class were deprived of their entitlement to make a fully informed decision concerning the Tender Offer because such misrepresentations and omissions were not corrected prior to the expiration of the Tender Offer.

175. As a direct and proximate result of the above-referenced material misstatements or omissions, Lead Plaintiff and the Class suffered significant damages.

176. Accordingly, Defendants are liable for violating Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9.

177. Lead Plaintiff and the Class are therefore entitled to recover an amount to be determined at trial.

THIRD CAUSE OF ACTION

Claim for Violations of Section 20(a) of the Exchange Act Against the Individual Defendants

178. Lead Plaintiff repeats and realleges each allegation contained above as if fully set forth herein.

179. The Individual Defendants acted as controlling persons of Emulex within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as officers and/or directors of Emulex, and participation in and/or awareness of the Company's operations and/or intimate knowledge of the false and misleading statements contained in the Recommendation Statement filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision making of the Company, including the content and dissemination of the various statements which Lead Plaintiff contends are false and misleading.

180. Each of the Individual Defendants were provided with or had unlimited access to copies of the Recommendation Statement and other statements alleged by Lead Plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

181. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations alleged herein, and exercised the same. The Recommendation Statement

at issue contains the unanimous recommendation of each of the Individual Defendants to approve the Transaction. They were, thus, directly involved in the making of this document.

182. In addition, as the Recommendation Statement sets forth at length, and as described herein, the Individual Defendants were each involved in negotiating, reviewing, and approving the Transaction. The Recommendation Statement purports to describe the various issues and information that the Individual Defendants reviewed and considered. The Individual Defendants participated in drafting and/or gave their input on the content of those descriptions.

183. By virtue of the foregoing, the Individual Defendants have violated Section 20(a) of the Exchange Act.

184. As set forth above, the Individual Defendants had the ability to exercise control over and did control a person or persons who have each violated Sections 14(e) and 14(d)(4) of the Exchange Act and Rule 14d-9, by their acts and omissions as alleged herein. By virtue of their positions as controlling persons, the Individual Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of Individual Defendants' conduct, Lead Plaintiff will be irreparably harmed.

PRAYER FOR RELIEF

WHEREFORE, Lead Plaintiff demands relief in his favor and in favor of the Class and against Defendants as follows:

A. Declaring that this action is properly maintainable as a Class action and certifying Lead Plaintiff as Class representative;

B. Rescinding, to the extent already implemented, the Transaction or any of the terms thereof, or granting Lead Plaintiff and the Class rescissory damages;

C. Directing the Individual Defendants to account to Lead Plaintiff and the Class for all damages suffered as a result of the Individual Defendants' wrongdoing;

D. Awarding Lead Plaintiff the costs and disbursements of this action, including reasonable attorneys' and experts' fees; and

E. Granting such other and further equitable relief as this Court may deem just and proper.

Dated: September 11, 2015

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No. 18-459

In the Supreme Court of the United States

EMULEX CORPORATION, ET AL.,
Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX – VOLUME II

(Pages 235 to 255)

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ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (October 11, 2018):

Opinion of the United States Court of Appeals for the Ninth Circuit, *Varjabedian v. Emulex Corp., et al.*, 888 F.3d 399 (9th Cir. 2018) 1a

Order of the United States District Court for the Central District of California Granting Defendants' Motion to Dismiss, *Varjabedian v. Emulex Corp., et al.*, 152 F. Supp. 3d 1226 (C.D. Cal. 2016) 27a

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing, *Varjabedian v. Emulex Corp., et al.* (9th Cir. Sept. 6, 2018) 58a

Order of the United States Court of Appeals for the Ninth Circuit Granting Stay of Mandate, *Varjabedian v. Emulex Corp., et al.* (9th Cir. Sept. 14, 2018) 60a

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Discussion Materials for

Project Emerald

Goldman, Sachs & Co.

February 25, 2015

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Summary of Argo Proposal

28-Dec-2014 Capital Structure | FYE June

($ in millions, except per share data)

		Offer
[illegible]		$ 8.00
% Premium to:		
Current	$ 6.33	26.4 %
30 Day Average	6.43	24.5 %
90 Day Average	6.02	32.8 %
Wall St Price Target	6.00	33.3 %
52 Week High	7.82	4.8 %
52 Week Low	4.48	78.4 %
Basic Shares (mm)		72.1
Options Dilution (mm)		0.3
Unvested Stock Awards (mm)		3.4
Diluted Shareholders (mm)		75.8
Implied Market Capitalization		$ 606
(-) Total Cash		(185)
(+) Cash Paid for Cash-Settled Unit Awards		10
(+) Total Debt (Including Value for Convertible Issue (Pro-rata) [1]		178
Implied Enterprise Value		$ 449

		Multiple		QLGC	Networking & Storage Peers Median
Emerald (Stand)	P/E				
	FY 2015	$ 0.64	12.5 x	13.3 x	15.9 x
	FY 2016	0.56	14.3 x	12.4	15.1
	Cash Adj. P/E				
	FY 2015	$ 0.64	12.5 x	10.9 x	15.2 x
	FY 2016	0.56	14.3	8.8	13.7
	EBIT				
	FY 2015	$ 53	11.2 x	8.7 x	13.0 x
	FY 2016	50	12.0	8.8	12.5
Emerald (Management)	P/E				
	FY 2015	$ 0.59	13.5 x	13.3 x	15.9 x
	FY 2016	0.57	14.1 x	12.4	15.1
	Cash Adj. P/E				
	FY 2015	$ 0.60	13.2 x	10.9 x	15.2 x
	FY 2016	0.57	14.1	8.8	13.7
	EBIT				
	FY 2015	$ 51	13.0 x	8.7 x	13.0 x
	FY 2016	50	12.2	8.8	12.5

Source: Emerald public filings, Emerald Management Projections, IBES, and Bloomberg. Market data as of 24-Feb-2015.
Note: Basic share count and equity awards data as of 24-Feb-2015 per Emerald management. Assumes cash-settled unit awards are paid in cash per Emerald management guidance.
Note: Cash-adjusted P/E calculated as (Share Price – Excess Cash Per Share) / (EPS – After tax interest income on Excess Cash Per Share), assuming 0.5% interest income on cash, 10% tax rate for Emerald, and 35% tax rate for peers. Excess cash is defined as cash in excess of total debt.
Note: Networking & Storage peers include Avaya, Brocade, Marvell, Mellanox, PMC Sierra and Qlogic.
[1] Assumes most of notes which shares for 1.75% Convertible Senior Notes due 2018 settled at in cash upon change of control. Excludes accrued and unpaid interest.

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I. Share Price Context

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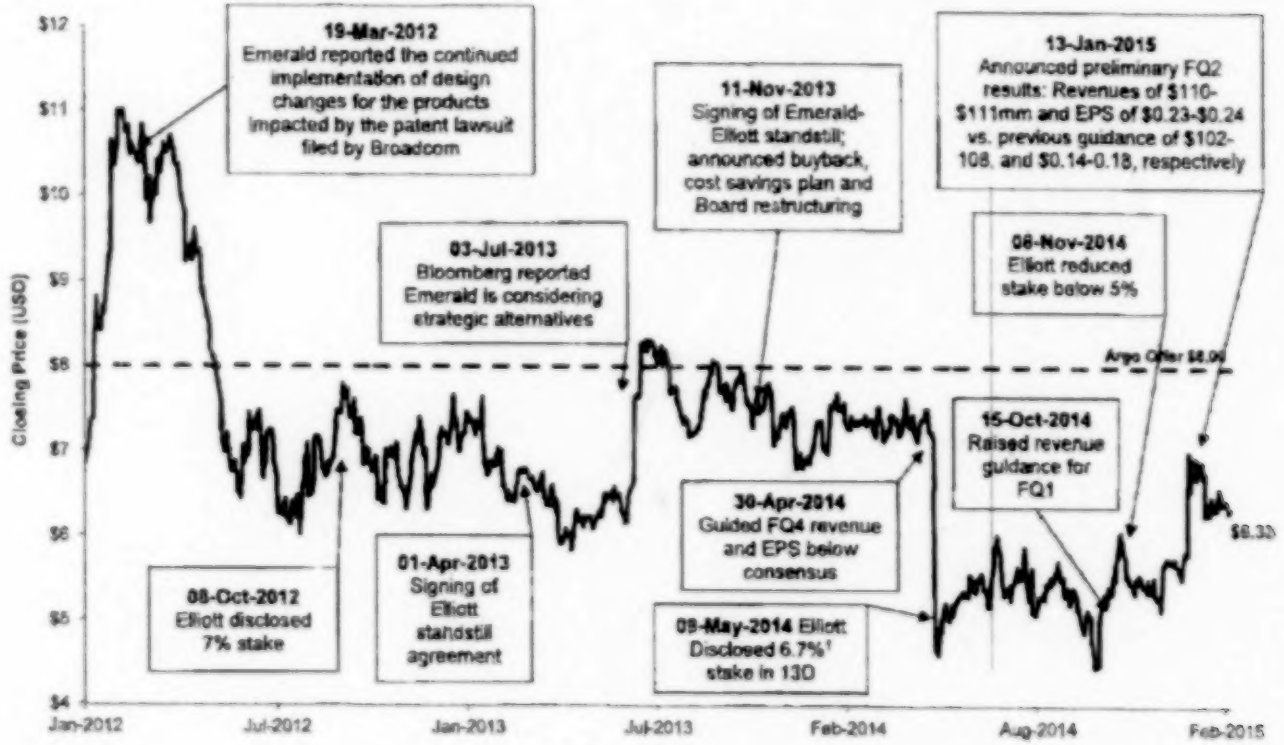
Emerald Share Price History

Last 3 Years



Source: Bloomberg, Emerald public filings and press releases. Market data as of 24-Feb-2015

[1] Elliott's 6.7% stake is based on its ownership of 5.0mm Emerald shares as disclosed in the 09-May-2014 13D filing and the Company's 74.9mm fully diluted shares outstanding

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Wall Street Perspectives

Revenue, EBIT and EPS Estimates ($ in millions, except per share data)

					Revenue		EBIT		EPS		Valuation Methodology
Firm	Estimate Date	Price Target	Δ to Current Stock Price	Rating	FY 2015	FY 2016	FY 2015	FY 2016	FY 2015	FY 2016	PE Mult.
Argus	15-Jan-15			HOLD					$ 0.52	$ 0.50	
Barclays	07-Feb-15	$ 6.00	(5.2)%	UNDERPERFORM	$ 418	$ 417	$ 55	$ 65	$ 0.65	$ 0.81	10x FY15
BMO Capital Markets	07-Feb-15	$ 7.00	10.6%	HOLD	418	418	57	62	$ 0.67	$ 0.82	12x FY16
DA Davidson	07-Feb-15	$ 7.25	14.9%	HOLD	418	403	62	57	0.67	0.65	
RBC	03-Feb-15	$ 6.00	(5.2)%	HOLD	409	409	49	43	0.57	0.49	~12x FTM
Stifel Nicolaus	07-Feb-15			HOLD	417	416	54	42	0.63	0.49	
Summit Research	07-Feb-15	$ 6.00	(5.2)%	HOLD	413	410	54	48	0.64	0.58	
Current Consensus Median		**$ 6.00**			**$ 416**	**$ 413**	**$ 55**	**$ 50**	**$ 0.64**	**$ 0.58**	
Emerald Management Projections					**$ 423**	**$ 402**	**$ 58**	**$ 60**	**$ 0.66**	**$ 0.67**	
% Delta vs. Current Consensus Median					*1.6%*	*(2.6)%*	*2.2%*	*(10.3)%*	*2.8%*	*1.0%*	

Emerald Analyst Ratings: Hold: 86% | Underperform: 14%

Source: Emerald Management Projections, IBES, and Wall Street Research as of 24-Feb-2015

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Historical and Projected Income Statement

FYE June

($ in millions, except per share data)

	Actuals		Emerald Management Projections					'14 - '19
Fiscal Year Ended June	2013A	2014A	2015E	2016E	2017E	2018E	2019E	CAGR
ECD Revenue	$ 466	$ 413	$ 393	$ 366	$ 381	$ 381	$ 389	(1.2)%
% Growth		(11.2)%	(4.9)%	(6.9)%	4.0 %	0.1 %	2.1 %	
NVP Revenue	$ 13	$ 34	$ 30	$ 36	$ 43	$ 51	$ 58	10.7 %
% Growth		157.0 %	(12.4)%	20.0 %	20.0 %	20.0 %	10.0 %	
Total Revenue	$ 479	$ 447	$ 423	$ 402	$ 423	$ 432	$ 446	(0.1)%
% Growth		(6.5)%	(5.5)%	(5.0)%	5.4 %	2.1 %	3.0 %	
ECD COGS	$(150)	$(141)	$(133)	$(131)	$(142)	$(146)	$(151)	
ECD Gross Margin	$ 306	$ 273	$ 260	$ 236	$ 239	$ 233	$ 238	(2.7)%
% Margin	64.0 %	66.0 %	66.2 %	64.3 %	62.8 %	61.1 %	61.1 %	
NVP COGS	$(3)	$(8)	$(7)	$(9)	$(11)	$(13)	$(14)	
NVP Gross Margin	$ 10	$ 27	$ 23	$ 27	$ 32	$ 38	$ 43	9.0 %
% Margin	77.1 %	81.7 %	77.5 %	75.0 %	75.0 %	75.0 %	75.0 %	
Total COGS	$(152)	$(147)	$(140)	$(139)	$(152)	$(161)	$(165)	
Gross Margin (ex. Mfg Var)	$ 316	$ 300	$ 283	$ 262	$ 271	$ 271	$ 280	(1.4)%
% Margin	66.1 %	67.2 %	67.0 %	65.3 %	64.0 %	62.7 %	62.9 %	
Manufacturing Variances	$(9)	$(6)	$(8)	$(7)	$(6)	$(6)	$(7)	
Gross Margin	$ 307	$ 294	$ 276	$ 255	$ 266	$ 266	$ 273	(1.9)%
% Margin	64.2 %	65.8 %	65.1 %	63.6 %	62.5 %	61.3 %	61.3 %	
Operating Expense	$(238)	$(239)	$(220)	$(206)	$(202)	$(198)	$(204)	
Non-GAAP EBIT	$ 69	$ 55	$ 56	$ 50	$ 63	$ 67	$ 69	4.5 %
% Margin	14.5 %	12.3 %	13.2 %	12.4 %	14.8 %	15.5 %	15.5 %	
Depreciation	$ 18	$ 19	$ 19	$ 16	$ 16	$ 16	$ 16	
Adj. EBITDA	$ 88	$ 74	$ 74	$ 66	$ 79	$ 83	$ 86	2.9 %
% Margin	18.3 %	16.5 %	17.6 %	16.4 %	18.6 %	19.2 %	19.2 %	
Non-GAAP Net Income	$ 67	$ 49	$ 48	$ 43	$ 54	$ 57	$ 59	4.0 %
% Margin	14.0 %	10.9 %	11.5 %	10.7 %	12.9 %	13.3 %	13.3 %	
Non-GAAP Diluted EPS	$ 0.73	$ 0.57	$ 0.66	$ 0.57	$ 0.70	$ 0.72	$ 0.72	4.9 %
% Growth		(22.3)%	15.9 %	(14.0)%	23.3 %	2.5 %	0.3 %	

Source: Emerald public filings and Emerald management Projections
Note: GAAP adjustments include patent litigation license fee, litigation expense, restructuring / site closure, IRS NOPA fee, Firstace acquisition-related expenses, non-recurring severance and associated costs, Dissidium takeover attempt, in-process R&D impairment, and rights-sale impairment.

II. Valuation Analyses

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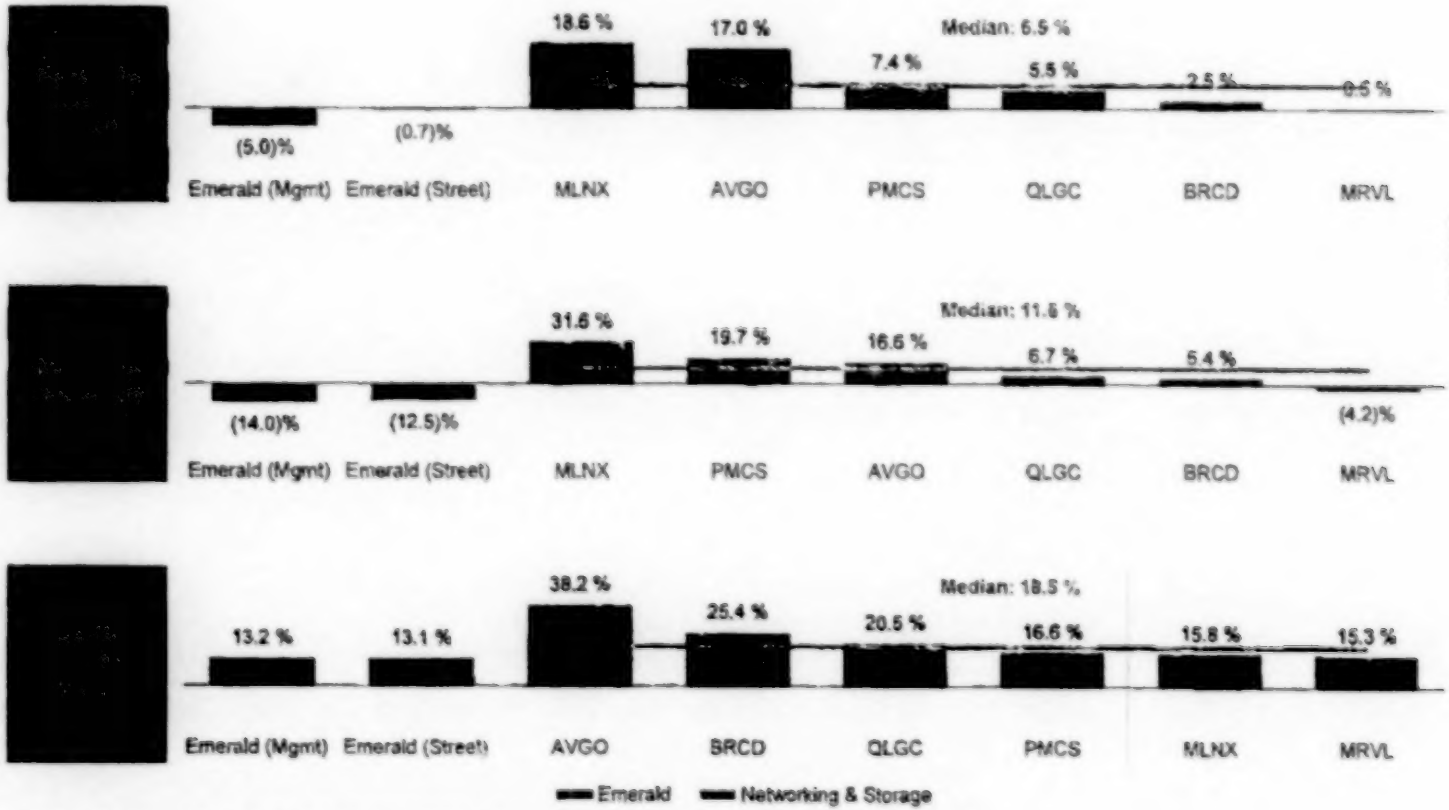
Operational Benchmarking



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Source: Emerald Management Projections, Emerald public filings, and Wall Street research as of 24-Feb-2015. All estimates have been calendarized to June

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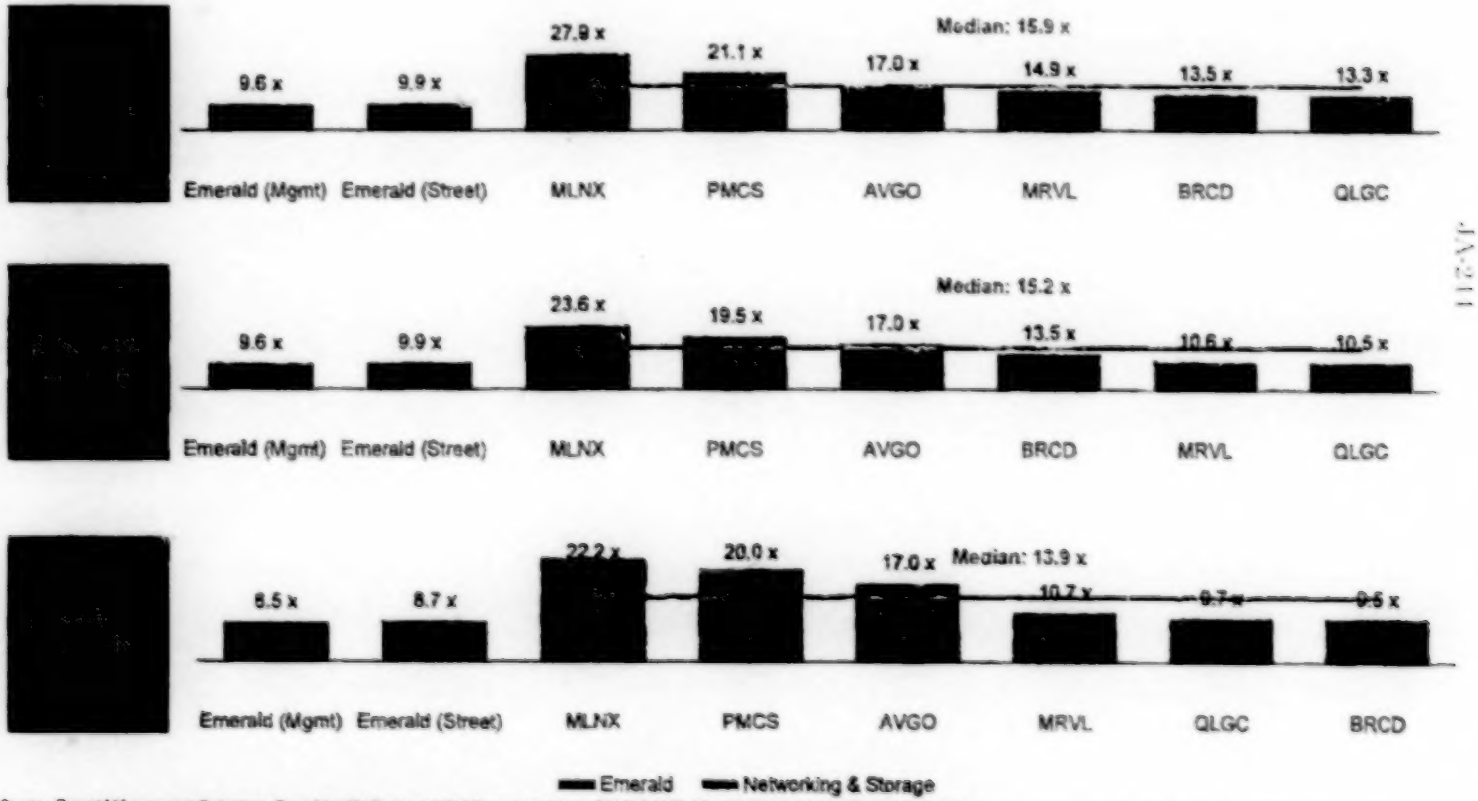
Comparison of Trading Multiples



Source: Emerald Management Projections, Emerald public filings, and Wall Street research as of 24-Feb-2015. All estimates have been calendarized to June.

[1] *Cash-adjusted P / E calculated as (Share Price – Excess Cash Per Share) / (EPS – After-tax Interest Income on Excess Cash Per Share), assuming 0.5% interest income on cash, 10% tax rate for Emerald, and 35% tax rate for peers. Excess cash is defined as cash in excess of total debt.*

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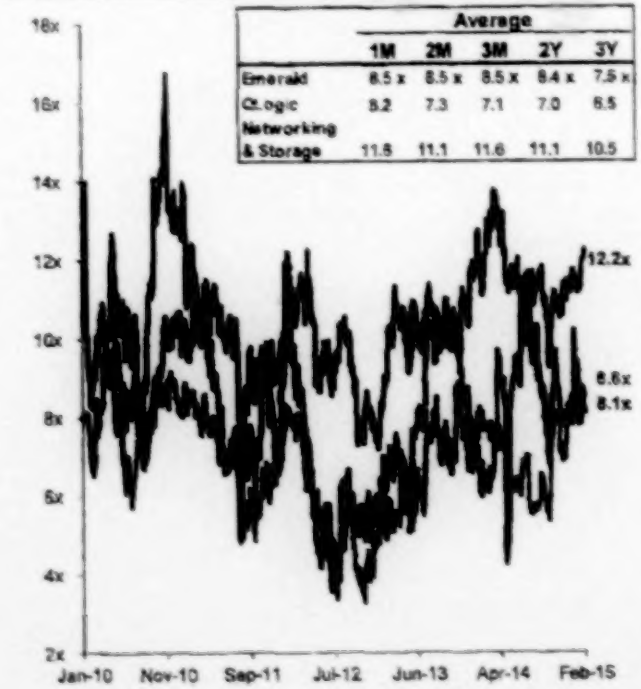
Comparing Multiples Over Time vs. Peers

Forward EBIT and P/E Multiples

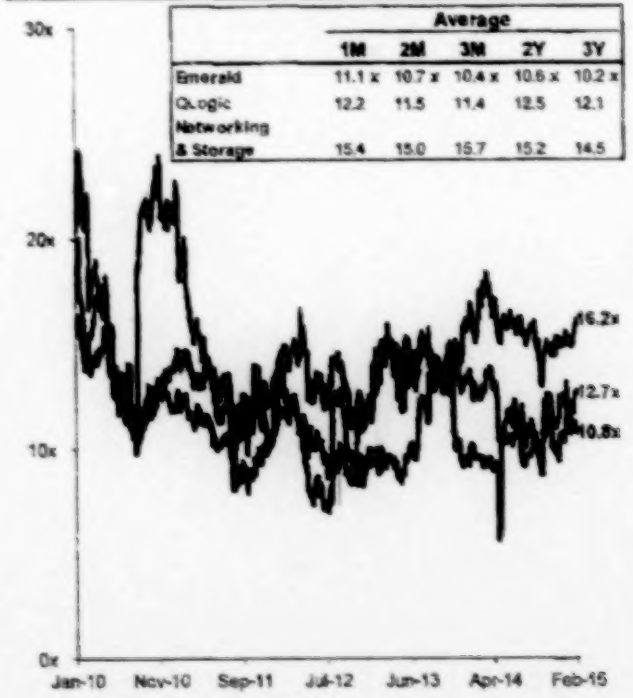
NTM EBIT Multiples

	Average				
	1M	2M	3M	2Y	3Y
Emerald	8.5 x	8.5 x	8.5 x	8.4 x	7.5 x
QLogic	8.2	7.3	7.1	7.0	6.5
Networking & Storage	11.8	11.1	11.6	11.1	10.5



NTM P/E Multiples

	Average				
	1M	2M	3M	2Y	3Y
Emerald	11.1 x	10.7 x	10.4 x	10.6 x	10.2 x
QLogic	12.2	11.5	11.4	12.5	12.1
Networking & Storage	15.4	15.0	15.7	15.2	14.5



—Emerald —QLogic —Networking & Storage

Source: Bloomberg, IBES, Emerald and applicable company filings, and Wall Street research as of 24-Feb-2015
Note: Networking & Storage peers include Avago, Brocade, Marvell, Mellanox, PMC Sierra and QLogic.

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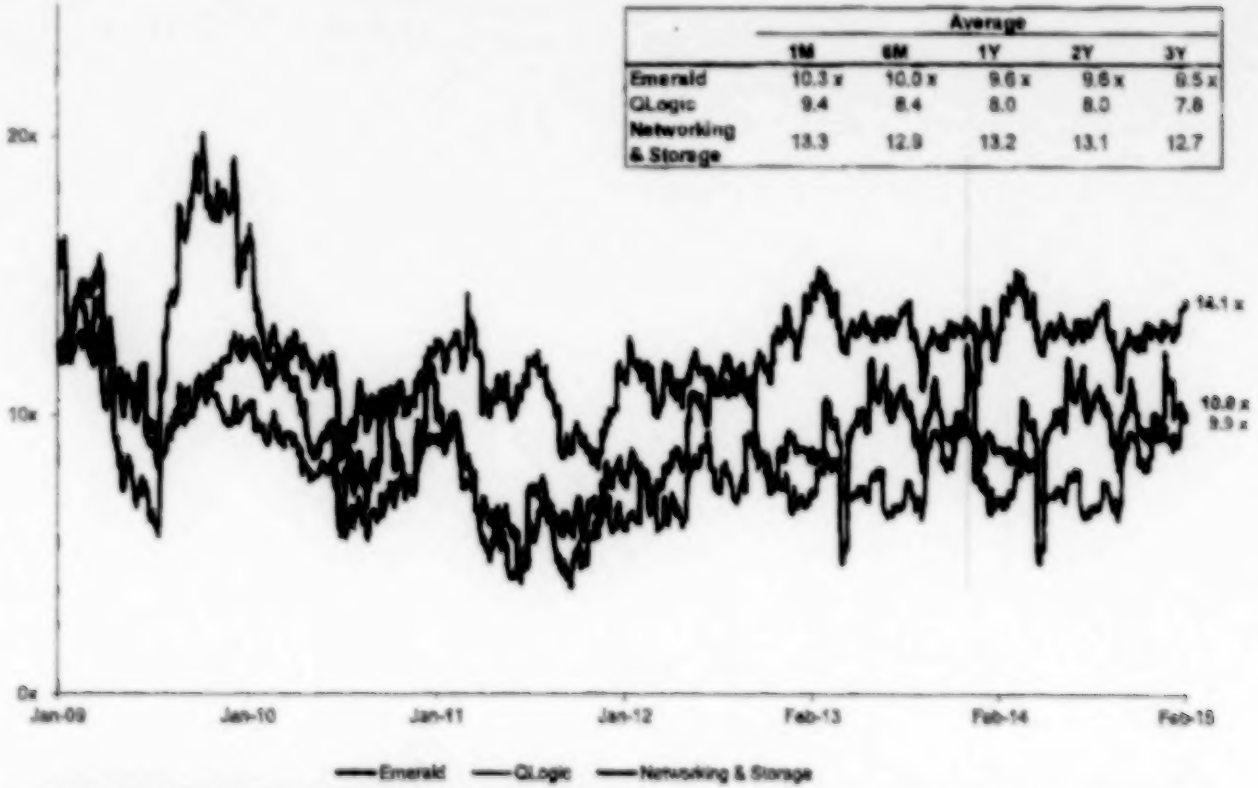
Comparing Multiples Over Time vs. Peers

Cash Adjusted NTM P/E Multiple Over Time

	Average				
	1M	6M	1Y	2Y	3Y
Emerald	10.3 x	10.0 x	9.6 x	9.6 x	9.5 x
QLogic	9.4	8.4	8.0	8.0	7.8
Networking & Storage	13.3	12.9	13.2	13.1	12.7



Source: Bloomberg, IBES, Emerald and applicable company filings. Market data as of 24-Feb-2015
Note: Networking & Storage peers include Avago, Brocade, Marvell, Mellanox, PMC Sierra and QLogic. Cash-adjusted P/E adjusted for excess cash balances defined as cash greater than debt balance. Assumes 0.5% interest income on net cash and company-specific tax rate

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Illustrative Present Value of Future Share Price

Assumed Dec 2014 Effective Date
($ per share, unless otherwise noted)

P / E Method

FY 2016 P/E

			9.0 x	10.0 x	11.0 x	12.0 x
Mgmt	FY 16E EPS	$ 0.87	$ 4.77	$ 5.30	$ 5.83	$ 6.36

FY 2017 P/E

			9.0 x	10.0 x	11.0 x	12.0 x
Mgmt	FY 17E EPS	$ 0.70	$ 5.17	$ 5.74	$ 6.31	$ 6.89

FY 2018 P/E

			9.0 x	10.0 x	11.0 x	12.0 x
Mgmt	FY 18E EPS	$ 0.72	$ 4.66	$ 5.17	$ 5.68	$ 6.20

Cash Adj. P / E Method

FY 2016E Cash Adj. P / E

				8.0 x	9.0 x	10.0 x	11.0 x
Mgmt	FY 16E Cash Adj. EPS	$ 0.56	FY 16E Cash Per Share	$ 0.35	$ 4.55	$ 5.08	$ 5.60	$ 6.13

FY 2017E Cash Adj. P / E

				8.0 x	9.0 x	10.0 x	11.0 x
Mgmt	FY 17E Cash Adj. EPS	$ 0.69	FY 16E Cash Per Share	$ 0.51	$ 5.05	$ 5.62	$ 6.19	$ 6.76

FY 2018E Cash Adj. P / E

				8.0 x	9.0 x	10.0 x	11.0 x
Mgmt	FY 18E Cash Adj. EPS	$ 0.71	FY 17E Cash Per Share	$ 1.20	$ 4.95	$ 5.46	$ 5.97	$ 6.48

Excess Cash[1]:
FY15: $26mm
FY16: $46mm
FY17: $93mm

Source: Emerald Management Projections

Note: Equity multiples used to calculate future equity value, then discounted 0.5, 1.5, and 2.5 years per FY16 / FY17 / FY18 respectively) using 12.9% cost of equity, which incorporates a size premium adjustment of 2.7%, representing the empirically observed excess historical market returns compared to the return predicted by Capital Asset Pricing Model (CAPM) for companies of Emerald's size. Share price is calculated with projected share count from Emerald Management Projections. Cash-adjusted EPS equated for excess cash balances, defined as cash greater than debt balance. Assumes 0.5% interest income on excess cash and 10% tax rate

[1] *Basic share count and equity awards data as of 24-Feb-2015 per Emerald management. Assumes cash-settled unit awards are paid in cash per Emerald management guidance.*

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Illustrative DCF Analysis

Cash Flows | FYE June

($ in millions)

	Actuals		Financial Management Projections					Terminal
FY Ended June	2013	2014	H2 2015	2016	2017	2018	2019	Year
Income Statement								
Revenue	$ 475	$ 447	$ 208	$ 402	$ 422	$ 432	$ 440	$ 440
% Growth		(6.0)%		(5.0)%	5.4 %	2.1 %	2.0 %	
COGS (Inc. Mfg. Variances)	(171)	(153)	(74)	(146)	(159)	(167)	(172)	(172)
Gross Profit	$307	$294	$ 134	$256	$263	$265	$273	$ 273
% Margin	64.2 %	65.8 %	64.6 %	63.8 %	62.5 %	61.3 %	61.2 %	61.2 %
Operating Expenses	(256)	(238)	(112)	(200)	(202)	(158)	(204)	(204)
Non-GAAP EBIT	$69	$56	$ 23	$56	$63	$67	$69	$ 69
% Margin	14.5 %	12.5 %	10.9 %	12.4 %	14.8 %	15.5 %	15.6 %	15.6 %
Taxes	(2)	(4)	(1)	(3)	(5)	(6)	(6)	(7)
% Tax Rate	3.4 %	8.0 %	4.4 %	7.0 %	7.8 %	9.1 %	9.1 %	10.0 %
D&A	18	18	9	18	18	18	18	18
EBITDA	$ 88	$ 74	$ 32	$ 68	$ 79	$ 83	$ 86	$ 86
% Margin	18.5 %	16.6 %	15.4 %	16.4 %	18.6 %	19.2 %	19.2 %	19.2 %
Cash Flow Items								
EBITDA	$ 88	$ 74	$ 32	$ 68	$ 79	$ 83	$ 86	$ 86
(-) Taxes[1]	(2)	(4)	(1)	(3)	(5)	(6)	(6)	(7)
(-) Capex[2]	(16)	(16)	(8)	(16)	(16)	(16)	(16)	(17)
(-) Change in NWC	(56)	11	4	2	(6)	(4)	(4)	(4)
Unlevered FCF Before Adjustments	$ 14	$ 66	$ 27	$ 48	$ 52	$ 57	$ 59	$ 58
After-Tax Adjustments:								
Mitigation Expense	(6)	(6)	(3)	0	0	0	0	0
Restructuring / Site Closure	0	(7)	0	0	0	0	0	0
IRS NOPA Fees	0	(1)	(0)	0	0	0	0	0
IRS NOPA - Cash Payment	0	0	0	(20)	0	0	0	0
Broadcom Royalty	(1)	(2)	(1)	(3)	(3)	0	0	0
Broadcom License Amortization	(4)	(4)	(2)	(3)	(2)	(2)	0	0
Stock Based Comp	(21)	(14)	(8)	(12)	(15)	(13)	(13)	(13)
Other[3]	(8)	(2)	2	1	1	1	0	0
Unlevered FCF	$(28)	$ 26	$ 17	$ 13	$ 36	$ 44	$ 46	$ 44
% Margin	(6.0)%	5.9 %	8.3 %	3.1 %	8.5 %	10.2 %	10.7 %	9.9 %
% Conversion	(32.7)%	34.8 %	53.9 %	19.1 %	45.9 %	53.0 %	53.5 %	51.6 %
% Growth		NM		(69.1)%	187.8 %	21.2 %	4.1 %	

Source: Financial Management Projections
[1] Assumes a 10% effective tax rate in the terminal year based on management guidance.
[2] Assumes terminal year capex is equal to 100% of depreciation.
[3] Other includes cash expenses related to Filtrex acquisition-related expenses, non-recurring severance and executive costs, and tax effect of LTD GAAP valuation allowance.

Illustrative DCF Analysis

Assumed Dec 2014 Effective Date

Price Per Share

Discount Rate	Perpetuity Growth Rate 2.0%	2.5%	3.0%	3.5%	4.0%
11.0%	$ 5.98	$ 6.25	$ 6.56	$ 6.90	$ 7.30
11.5%	5.66	5.90	6.17	6.48	6.82
12.0%	5.38	5.59	5.83	6.10	6.40
12.5%	5.13	5.32	5.53	5.76	6.00
13.0%	4.89	5.07	5.25	5.46	5.69

Terminal NTM EBIT Multiple

Discount Rate	Perpetuity Growth Rate 2.0%	2.5%	3.0%	3.5%	4.0%
11.0%	7.5x	8.0x	8.5x	9.0x	9.7x
11.5%	7.1	7.5	8.0	8.5	9.0
12.0%	6.8	7.2	7.6	8.0	8.5
12.5%	6.5	6.8	7.2	7.6	8.0
13.0%	6.2	6.5	6.8	7.2	7.6

Source: Emerald Management Projections
Note: Analysis reflects a 4.5 year DCF from Dec 2014 (Q2 FY15) to June 2019 (FY19)
Note: WACC range informed by current market-based inputs and capital structure assuming excess cash; rounded bids as of 24-Feb-2015
Note: Basic share count and equity balance data as of 24-Feb-2015 per Emerald management. Assumes cash settled unit awards are paid in cash per Emerald management guidance

Appendix A: Additional Materials

GS-AV

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INVESTMENT BANKING DIVISION

Selected Public Trading Comparables

Networking & Storage Peers | Calendarized to June FYE

($ in millions, except per share data)

Company	Closing Price 24-Feb-2015	% of 52 Week High	Adjusted Equity Market Cap	Adjusted Enterprise Value	Enterprise Value Multiples EBIT 2015	EBIT 2016	Calendarized P/E Multiples 2015	2016	Calendarized Cash Adj. P/E Multiples 2015	2016	FY'15-'16 Revenue Growth	FY'15-'16 EPS Growth	FY'16 EBIT Margin	5-Year EPS CAGR	FY'16 Debt / EBITDA
Emerald (Management)	$ 8.35	93 %	$ 429	$ 477	8.5 x	9.6 x	9.6 x	11.2 x	9.9 x	11.1 x	(5.0)%	(14.0)%	10.2 %	4.7 %	2.4 x
Emerald (Street)	$ 8.73	83 %	$ 429	$ 477	8.7 x	9.5 x	9.6 x	11.3 x	9.9 x	11.3 x	(0.7)%	(12.5)%	13.1 %	10.0 %	1.9 x
Networking & Storage Peers															
Avago	$ 113.19	100 %	$ 33,062	$ 37,504	17.0 x	14.0 x	17.0 x	14.8 x	17.0 x	14.8 x	17.0 %	10.9 %	38.2 %	33.8 %	2.1 x
Marvell	13.33	96	8,570	8,070	10.7	10.0	14.8	13.6	10.8	11.1	0.5	(4.2)%	16.3	8.8	0.0 x
Brocade	10.42	98	5,371	5,470	9.3	9.4	13.6	12.8	13.3	12.8	2.5	5.4	29.4	5.0	1.7 x
Mellanox	46.53	87	2,248	1,860	22.2	16.3	27.9	21.2	22.6	17.0	10.8	31.8	15.8	30.8	0.0 x
PMC-Sierra	6.30	91	1,054	1,076	20.0	17.3	21.1	17.8	19.8	16.3	7.4	19.7	16.8	NA	0.0 x
Qlogic	14.84	96	1,329	1,050	8.7	8.8	13.3	12.4	10.3	9.6	8.3	8.7	33.5	9.8	0.0 x
	Mean	96 %			14.8 x	12.8 x	17.9 x	15.7 x	15.8 x	13.7 x	8.8 %	12.8 %	22.8 %	16.2 %	0.8 x
	Median	97			15.8	12.6	15.9	16.1	16.3	13.7	6.0	11.8	16.5	9.8	0.0 x

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Source: *Emerald Management Projections, Bloomberg, IBES, Emerald and applicable company filings, and press releases. Market data as of 24-Feb-2015*
Note: *Estimates calendarized to June year-end.*
Note: *Basic share count and equity awards data for Emerald as of 24-Feb-2015 per Emerald management. Assumes cash-settled unit awards are paid in cash per Emerald management guidance*
Note: *Cash-adjusted P / E calculated as (Share Price – Excess Cash Per Share) / (EPS – After-tax Interest Income on Excess Cash Per Share), assuming 0.5% interest income on cash, 18% tax rate for Emerald, and 35% tax rate for peers. Excess cash is defined as cash in excess of total debt.*

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INVESTMENT BANKING DIVISION

WACC Calculation for Emerald

Based on Historical Axioma Beta as of 24-Feb-2015

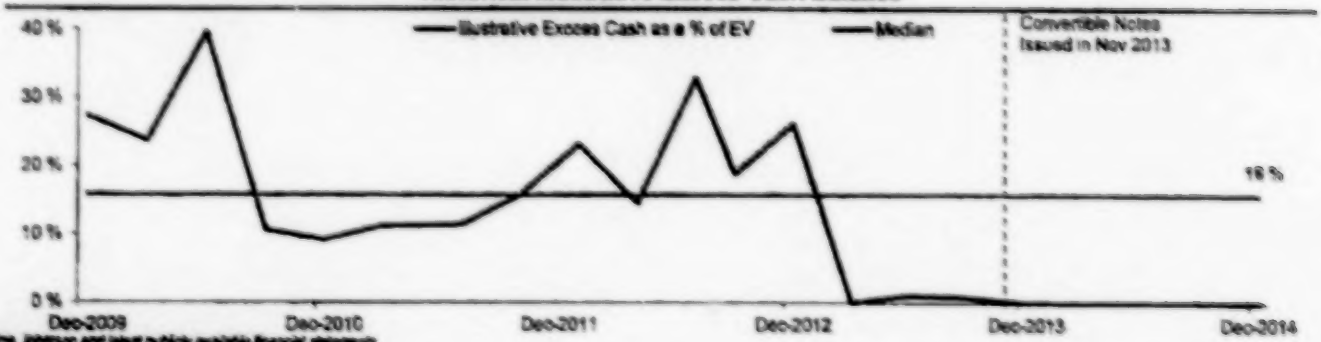
WACC Assumptions

Gross Debt / (Debt - Cash + Equity)	0.0 %
Permanent Cash / (Debt - Cash + Equity)	10.0 %
Equity / (Debt - Cash + Equity)	110.0 %
Implied Debt to Cap	**(10.0)%**
Implied Debt / Equity Ratio	**(9.1)x**
Risk-Free Rate[1]	2.38 %
Equity Beta[2]	1.27
Equity Risk Premium[3]	6.96 %
Cost of Equity	**11.2 %**
Pre-Tax Cost of Debt	6.0 %
Marginal Tax Rate[4]	10.0 %
After-Tax Cost of Debt	5.4 %
Cash Yield	0.5 %
After-Tax Cash Yield	0.5 %
WACC	**12.3 %**

Weighted Average Cost of Capital

Permanent Cash as % of EV					
0.0 %	5.0 %	10.0 %	15.0 %	20.0 %	25.0 %
11.2 %	11.7 %	12.3 %	12.8 %	13.3 %	13.9 %

Historical Illustrative Excess Cash Balance[5]



Source: Axioma, Bloomberg and latest publicly available financial statements
[1] Risk Free Rate per US Govt. 2.38% due Feb 2031 as of 24-Feb-2015
[2] Historical Axioma Beta as of as of 24-Feb-2015
[3] Assumes equity risk premium of 6.96% per Ibbotson
[4] Marginal tax rate per Emerald management guidance
[5] Illustrative excess cash assumes $100mm in permanent cash, and is calculated as (Net Cash – Permanent Cash) / Enterprise Value

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Emerald Beta Over Time

Last 3 Years

Source: Axioma Indices as of 24-Feb-2015

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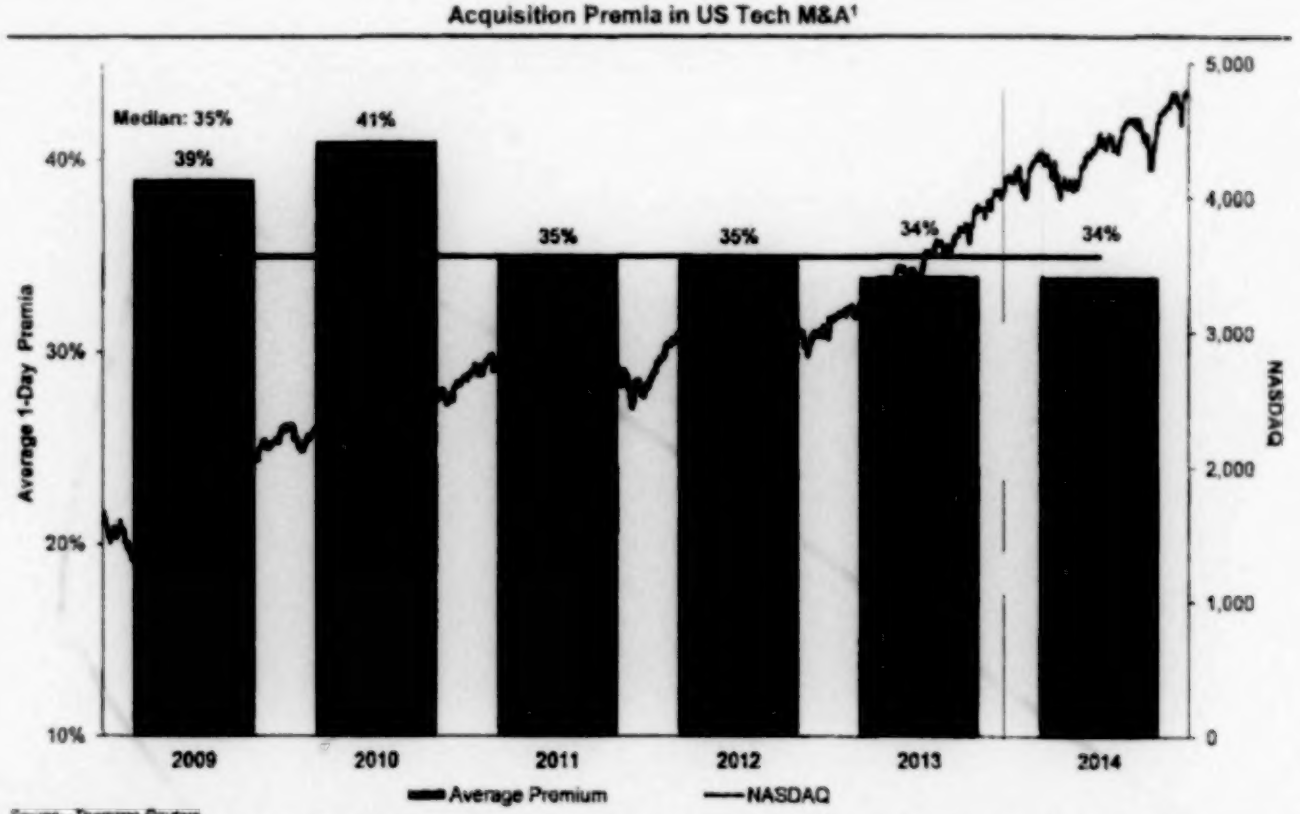
Perspectives on M&A Premia For All Cash Deals



Source: Thomson Reuters

[1] Reflects the premium relative to the target's stock price 1-day prior to announcement. Excludes transactions with premiums in excess of 150% or less than (50)%. SDC screen excludes share buybacks and acquisitions of partial interest if the percentage of shares owned after the transaction is below 50%.

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Selected Semiconductor Transactions

($ in millions)

Announce Date	Acquirer	Target	Equity Consideration[1]	Enterprise Value	Premium Over Undisturbed[2]	Premium Over 52-Wk High	Target's 1 Year Forward Multiple[3] Revenue	Net Income
2014								
10/14/2014	Qualcomm	CSR	$ 2,500	$ 2,190	56.5 %	11.6 %	2.7 x	25.7 x
8/22/2014	Marvell	Peregrine	489	471	62.5	7.4	2.8	NM
8/20/2014	Infineon	International Rectifier	3,018	2,600	50.6	39.3	2.0	26.5
6/23/2014	Avago	PLX Technology	309	293	9.4	(4.8)	2.8	23.8
6/16/2014	SanDisk	Fusion-IO	1,274	1,100	21.2	(27.0)	2.5	NM
6/9/2014	Analog	Hittite Microwave	2,466	1,974	34.7	NA	6.2	29.4
2/10/2014	Microchip	Supertex	399	248	23.4	21.8	3.3	42.0
4/28/2014	Cirrus Logic	Wolfson	458	467	77.4	NA	2.5	99.0
Mean					**42.0 %**	**8.0 %**	**3.0 x**	**41.1 x**
Median					**42.6**	**8.5**	**2.8**	**27.8**
2013								
12/16/2013	Avago	LSI	7,028	6,366	46.9	NA	2.7	19.4
6/15/2013	Maxim	Volterra	533	478	55.4	(10.5)	3.2	31.5
Mean / Median					**51.2 %**	**(10.5) %**	**3.0 x**	**25.4 x**
2012								
7/27/2012	Apple	AuthenTec	$ 393	$ 374	57.8 %	49.8 %	4.4 x	79.1 x
5/2/2012	Microchip	Standard Microsystems	970	808	37.9	31.0	1.9	24.8
Mean / Median					**47.8 %**	**40.4 %**	**3.2 x**	**51.9 x**
2011								
5/26/2011	Skyworks	Advanced Analogic Tech	$ 265	$ 181	51.0 %	22.4 %	1.6 x	73.9 x
7/20/2011	Microsemi	Zarlink	601	460	66.8	49.8	1.7	15.9
9/12/2011	Broadcom	NetLogic	3,912	3,693	58.7	14.4	7.4	37.8
4/4/2011	Texas Instruments	National Semiconductor	6,490	5,543	77.7	56.3	4.2	20.6
1/6/2011	Qualcomm	Atheros	3,807	3,241	21.6	2.5	3.0	20.6
Mean					**54.7 %**	**29.0 %**	**3.6 x**	**31.8 x**
Median					**56.7**	**22.4**	**3.0**	**20.6**
Mean					**44.5 %**	**17.6 %**	**3.0 x**	**35.0 x**
Median					**50.8**	**14.4**	**2.7**	**26.1**

Source: Press Releases and Bloomberg
[1] Represents fully diluted equity consideration at time of announcement as calculated with latest publicly available filings.
[2] Represents premium to closing price on date prior to first mention in publicly available news source.
[3] IBES 1 year forward estimates at the time of announcement.

AA-255

No. 18-459

In the Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held, in express disagreement with five other courts of appeals, that Section 14(e) of the Securities Exchange Act of 1934 supports an inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer.

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, who were defendants in the United States District Court for the Central District of California and appellees in the United States Court of Appeals for the Ninth Circuit, are Emulex Corporation; Bruce C. Edwards, Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari, and Dean A. Yoost, individual members of Emulex's board of directors; Emerald Merger Sub, Inc.; and Avago Technologies Wireless (USA) Manufacturing Inc.

Respondents are Gary Varjabedian and Jerry Mutza. Although Varjabedian, who is listed as plaintiff-appellant in the caption for the decision below, filed the initial complaint, the district court appointed Mutza as lead plaintiff. Both Mutza and Varjabedian represent the same putative class of former Emulex shareholders. Pet. App. 1a n.1.

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CASES

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Bath v. Bushkin, Gaims, Gaines & Jonas,
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Beck v. Dobrowski,
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Bell v. Cameron Meadows Land Co.,
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Blue Chip Stamps v. Manor Drug Stores,
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Cannon v. University of Chicago,
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Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
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Chris-Craft Industries, Inc. v. Piper Aircraft Corp.,
480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973) 2

Correctional Services Corp. v. Malesko,
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Cort v. Ash,
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Currie v. Cayman Resources Corp.,
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Deviries v. Prudential-Bache Securities, Inc.,
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Electronic Specialty Co. v. International Controls Corp.,
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Ernst & Ernst v. Hochfelder,
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Finkel v. Stratton Corp.,
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Gustafson v. Alloyd Co.,
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Halliburton Co. v. Erica P. John Fund, Inc.,
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J.I. Case Co. v. Borak,
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TABLE OF AUTHORITIES—Continued

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Janus Capital Group, Inc. v. First Derivative Traders,
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Jesner v. Arab Bank, PLC,
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Johnson v. Interstate Management Co.,
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Newcome v. Esrey,
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Newman v. Prior,
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Piper v. Chris-Craft Industries, Inc.,
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Polinsky v. MCA Inc.,
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Santa Fe Industries, Inc. v. Green,
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Schlifke v. Seafirst Corp.,
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Schreiber v. Burlington Northern, Inc.,
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SEC v. Texas Gulf Sulphur Co.,
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Smallwood v. Pearl Brewing Co.,
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Stephenson v. Calpine Conifers II, Ltd.,
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Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.,
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Superintendent of Insurance v. Bankers Life & Casualty Co.,
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Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
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Virginia Bankshares, Inc. v. Sandberg,
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In re Washington Public Power Supply System Securities Litigation,
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Wilkie v. Robbins,
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Yates v. United States,
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15 U.S.C. § 77t(b) 7, 49

15 U.S.C. § 77t(b) (1976) 36

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28 U.S.C. § 1254(1) 1

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Pub. L. No. 91-567, 84 Stat. 1497 (1970) 6

Pub. L. No. 104-67, 109 Stat. 737 (1995) 10

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LEGISLATIVE MATERIALS

H.R. Rep. No. 90-1711 (1968) 29

S. Rep. No. 90-550 (1967) 6, 29

OTHER AUTHORITIES

Cornerstone Research, *Securities Class Action Filings—2017 Year In Review* (2018), http://bit.ly/Cornerstone2017YIR 41

William M. Fletcher *et al.*, *Fletcher Cyclopedia of the Law of Corporations* (Westlaw Sept. 2018 update) 6

OED Online (Dec. 2018), http://www.oed.com 26

TABLE OF AUTHORITIES—Continued

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Robert C. Rosen *et al.*, *International Securities Regulation* (Westlaw Nov. 2018 update). 6

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 27, 46

U.S. Chamber Institute for Legal Reform, *The Trial Lawyers' New Merger Tax* (2012), http://bit.ly/newmergertax 41

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 888 F.3d 399. The district court's order dismissing the complaint with prejudice (Pet. App. 27a-57a) is reported at 152 F. Supp. 3d 1226. The order of the court of appeals denying rehearing (Pet. App. 58a-59a) is unreported.

JURISDICTION

The court of appeals entered its opinion on April 20, 2018. Pet. App. 1a. On September 6, 2018, the court of appeals denied a timely petition for rehearing. *Id.* at 58a-59a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, section 1 of the Constitution vests "[a]ll legislative Powers" in Congress. U.S. Const. art 1, § 1.

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The [Securities and Exchange]

> Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Other pertinent statutory and regulatory provisions are reprinted in an addendum hereto.

INTRODUCTION

This case tests the power of the courts to extend, and to create at all, inferred private rights of action to enforce federal law. As this Court recognized in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 24-25 (1977), Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), "makes no provision whatever for a private cause of action, such as those explicitly provided in other sections of the [securities laws]." Nevertheless, following the permissive approach articulated in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), for discerning private rights of action, some lower courts have inferred from Section 14(e) a private cause of action for damages and other relief for persons alleging false statements or misleading omissions in connection with a tender offer.

Until recently, every federal court to have inferred such a private cause of action—including five courts of appeals beginning with *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 360-62 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973)—had held that plaintiffs are required to show that the defendant acted with scienter. The courts had been unanimous in refusing to infer a private remedy under Section 14(e) for mere negligence. In the decision below, however, the Ninth Circuit took the inferred private remedy under Section 14(e) to new heights. It held

that the private cause of action it had previously inferred under Section 14(e) requires "only negligence, not scienter." Pet. App. 16a.

That decision was wrong, and should be reversed. Even if one starts from the premise that an inferred private right of action exists under Section 14(e), as the Ninth Circuit did below, there is no basis for *expanding* that cause of action to reach conduct that was taken without scienter. This Court has emphasized that all of the "[c]oncerns with the judicial *creation* of a private cause of action caution against its *expansion*," too. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (alteration in original) (emphasis added) (citation omitted). Extension of an inferred private remedy is only appropriate, therefore, where there is clear, affirmative evidence that Congress intended a broader scope of private liability than the previously recognized cause of action captures.

Here, however, the opposite is true. The text of Section 14(e) says nothing about negligence, even though other provisions of the securities laws demonstrate that Congress knew full well how to express a negligence standard when it wanted one. And that omission is unsurprising, since Section 14(e) was modeled on Rule 10b-5 (17 C.F.R. § 240.10b-5), which, as this Court has held, requires a showing of scienter. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976). Moreover, when Congress expressly authorized private negligence actions under the securities laws, it set out robust procedural protections to guard against their abuse. Section 14(e) has none of those protections. Allowing private negligence actions under Section 14(e) also would circumvent the express cause of action in Section 18

of the Securities Exchange Act of 1934, which applies to alleged misstatements exactly like the one at issue here—but requires more than negligence.

For these reasons and other reasons discussed below, the Ninth Circuit was wrong to *extend* the private cause of action it had previously inferred under Section 14(e) to mere negligence. But the bigger problem is that there is no basis for inferring any private right of action under Section 14(e) at all. As this Court has admonished, "[r]aising up causes of action where statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (citation omitted). Nothing in Section 14(e), or in its surrounding provisions, evinces any intent to create a private right of action. Instead, all signs point to the opposite conclusion. Ultimately, therefore, the reason that the Ninth Circuit was wrong to hold that private claims for negligence are actionable under Section 14(e) is that Congress never intended a private remedy under Section 14(e) at all.

In any event, whether viewed from the perspective of extending or creating an inferred private right of action, the Ninth Circuit's decision cannot stand.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY SCHEME

a. In the wake of the 1929 stock market crash that caused the Great Depression, Congress passed two major laws designed to protect the securities markets. The first, the Securities Act of 1933 (1933 Act), regulates disclosures made in connection with the initial distribution and purchase of securities. The second, the Exchange Act of 1934 (1934 Act),

regulates subsequent transactions involving securities. *See Ernst & Ernst,* 425 U.S. at 194-95.

The 1933 and 1934 Acts set out numerous requirements for individuals and entities that issue or subsequently trade securities. To supplement these statutory requirements and restrictions, Congress also conferred extensive authority on the Securities and Exchange Commission (SEC) to regulate the securities markets. Pursuant to that authority, the Commission has promulgated regulations governing a host of acts and practices involving securities. The best known of these regulations is Rule 10b-5, which the SEC adopted in 1942 pursuant to Section 10(b) of the 1934 Act.

Rule 10b-5 makes it unlawful, "in connection with the purchase or sale of any security,"

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person.

17 C.F.R. § 240.10b-5.

Congress has also supplemented the securities laws by adding new provisions or changing old ones when such changes became necessary. In 1968, Congress amended the 1934 Act in response to a wave of takeover bids in which offerors pressured

shareholders of a target company to tender their shares without disclosing the offeror's interests or plans for the company. *See* S. Rep. No. 90-550, at 2 (1967) (Senate Report). Congress responded to this problem in the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968), by requiring such tender offerors to disclose their identity, background, and the purpose of their purchase, 15 U.S.C. § 78n(d)(1), and by permitting shareholders to withdraw tendered shares within a specified timeframe, *id.* § 78n(d)(5).[1]

To prevent parties from circumventing the new disclosure obligations, Congress also enacted Section 14(e)—quoted above, *supra* at 1—which it "modeled on the antifraud provisions of § 10(b) of the [1934] Act and Rule 10b-5." *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10 (1985). This Court has explained that the first sentence of Section 14(e) "prohibits fraudulent acts in connection with a tender offer." *United States v. O'Hagan*, 521 U.S. 642, 667 (1997). The second sentence, added in 1970, directs the SEC to promulgate such rules as are "reasonably designed to prevent[] such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. § 78n(e); *see* Pub. L. No. 91-567, § 5, 84 Stat. 1497, 1497-98 (1970).

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[1] In a tender offer, an acquirer publicly offers to purchase the target's stock directly from shareholders, usually at an above-market price to induce sales. 6A William M. Fletcher *et al.*, *Fletcher Cyclopedia of the Law of Corporations* § 2841.10 (Westlaw Sept. 2018 update). Not all tender offers are hostile; many involve cooperation between the target firm and the acquiring firm, as both sides see an advantage in the transaction and may, as happened in this case, use it as a vehicle for a merger. *See* 8 Robert C. Rosen *et al.*, *International Securities Regulation* § US:103 (Westlaw Nov. 2018 update).

b. Congress also carefully reticulated an enforcement scheme for these requirements.

Congress gave the SEC extensive enforcement authority, including the authority to sue to enjoin violations of the securities laws "[w]henever it shall appear to [it] that any person is engaged or is about to engage in" such a violation. 15 U.S.C. § 78u(d)(1); *see also id.* § 77t(b). The SEC also can seek civil penalties for violations of the securities laws. Violations by individuals involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" are subject to penalties up to $100,000, while violations that do not are subject to penalties up to $5,000. *See* 15 U.S.C. § 78u(d)(3)(A)-(B); *id.* § 77t(d)(1)-(2). And the SEC can refer cases to the Attorney General for criminal prosecution of "[a]ny person who willfully violates" the securities laws. *Id.* § 78ff(a); *see also id.* § 77t(b).

Congress also created several express causes of action in the 1933 and 1934 Acts under which private parties may bring damages actions alleging violations of the securities laws. For example:

- Section 11 of the 1933 Act authorizes suit against securities issuers, their officers and directors, and certain agents and underwriters by purchasers of a security who relied on materially misleading statements or omissions in the security's registration statement. 15 U.S.C. § 77k.
- Section 12 of the 1933 Act authorizes suit against the seller of securities by purchasers who were sold a security without an effective registration statement or prospectus, 15 U.S.C. § 77*l*(a)(1), or who

were sold a security by means of a prospectus or other communications containing materially misleading information, *id.* § 77*l*(a)(2).

- Section 9(f) of the 1934 Act authorizes suits against persons who "willfully" engage in certain manipulative or deceptive trading practices by purchasers negatively affected by those manipulative or deceptive practices. 15 U.S.C. § 78i(f).
- Section 16(b) of the 1934 Act authorizes suits by securities holders in the name of the issuer of those securities against officers or directors of the issuer who earn profit by selling stock they have held for less than six months. 15 U.S.C. § 78p(b).
- Section 18(a) of the 1934 Act authorizes suit by purchasers or sellers of securities against any person who makes a false or misleading statement in a filing with the SEC that affects the price at which the security was bought or sold. 15 U.S.C. § 78r(a).

c. In the decades following the 1933 and 1934 Acts, courts inferred additional private causes of action from various provisions of the securities laws.

Lower courts initially inferred a private right of action under Section 10(b) of the 1934 Act and Rule 10b-5. In *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971), this Court "acquiesced" in those decisions. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 n.19 (1979); *accord Ernst & Ernst*, 425 U.S. at 196. This inferred private remedy authorizes private parties to recover damages sustained in reliance on a material misstatement or

omission if they can show, among other things, that the speaker acted with scienter—that is, in intentional violation of the securities laws. In *Ernst & Ernst*, this Court rejected the argument that this inferred private right of action could be applied to "negligent conduct." 425 U.S. at 209-10.

In *J.I. Case Co. v. Borak*, this Court inferred a private right to sue for violations of the proxy-solicitation rules contained in Section 14(a) of the 1934 Act, too. 377 U.S. 426, 432 (1964). Drawing from the "purpose of § 14(a)," the Court explained that "[w]e . . . believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 431, 433.

Following *Borak*, some lower courts inferred a private cause of action from Section 14(e) of the 1934 Act—the provision at issue here—as well. *See, e.g.*, *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 946-47 (2d Cir. 1969); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 596 n.20 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974). In *Piper*, this Court refused to recognize a private right of action under Section 14(e) on the part of *tender offerors* whose overtures were frustrated, but reserved decision on whether such a private remedy might be inferred for *shareholders*. 430 U.S. at 38-39. In the wake of *Piper*, some lower courts continued to allow inferred actions by private shareholders under Section 14(e). *See, e.g.*, *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1281 n.7 (9th Cir. 1982).

As this Court's penchant for inferring private rights waned in the decades following *Borak*, however, it has repeatedly refused either to recognize new inferred private rights and remedies under the

securities laws, or to expand preexisting ones. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (refusing to infer aiding and abetting liability under Section 10(b) and Rule 10b-5); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991) (refusing to "expand the class of plaintiffs entitled to bring *Borak* actions" under Section 14(a)); *Touche Ross Co.*, 442 U.S. at 576-78 (refusing to infer private right of action under Section 17(a) of the 1934 Act).

d. Private litigation under the securities laws has been prone to abuse. In 1995, Congress enacted the Private Securities Litigation Reform Act (PSLRA) to combat such abuse. Among other reforms, the PSLRA imposes heightened pleading standards designed to "curb frivolous, lawyer-driven litigation." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Section 21D(b)(2) of the PSLRA provides that plaintiffs in federal securities cases must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," 15 U.S.C. § 78u-4(b)(2)(A), a requirement that "unequivocally raise[d] the bar for pleading scienter" when required. *Tellabs*, 551 U.S. at 314, 321 (alteration in original) (citation omitted).

The PSLRA's heightened pleading requirements apply to inferred as well as express causes of action. In enacting the PSLRA, however, Congress made clear that it did *not* intend to ratify the existence of any implied private rights. *See* Pub. L. No. 104-67, § 203, 109 Stat. 737, 762 (1995) ("Nothing in this Act . . . shall be deemed to create or ratify any implied private right of action . . . ."); *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 300 (2014) (Thomas, J., concurring in the judgment).

II. FACTS AND PROCEDURAL HISTORY

A. Transaction At Issue

This case arises from a tender offer resulting in the merger of two technology companies in 2015: Emulex, an electronic-equipment producer, and Avago Technologies Wireless (USA) Manufacturing Inc. (Avago), a designer of analog semiconductor devices. JA 183 ¶ 14. On February 25, 2015, Emulex and Avago announced that they had agreed to merge by way of an accepted tender offer. JA 193 ¶¶ 52–53. Under the terms of Avago's offer, one of Avago's subsidiaries offered to pay $8.00 for every share of outstanding Emulex stock, representing a 26.4% premium on Emulex's stock price the day before the merger was announced. JA 178-79, 180-81 ¶¶ 2-3, 7.

Avago initiated its tender offer on April 7, 2015. *See* JA 179 ¶ 4. On the same day, Emulex filed a statement with the SEC, pursuant to 17 C.F.R. § 240.14d-101 Schedule 14D-9, setting out the Emulex board's recommendation to its shareholders regarding Avago's tender offer. *See* JA 217 ¶ 135. This 48-page Recommendation Statement listed nearly a dozen separate reasons for approving the merger, including that Emulex shareholders would receive a premium on their stock. JA 76-81. The Recommendation Statement also included a five-page summary of a "fairness opinion" that Emulex had received from its financial advisor, Goldman Sachs, finding that the $8.00 per share tender offer price was fair. JA 85-97; *see* Pet. App. 30a-31a.

B. This Litigation

The day after Emulex filed its Recommendation Statement with the SEC, Respondents filed a

putative federal securities class action in the U.S. District Court for the Central District of California on behalf of themselves and other shareholders, seeking to enjoin the merger. To avoid a prolonged discovery dispute, Emulex provided Respondents with the core documents, including the so-called "Board Book" that Goldman Sachs had compiled in undertaking its fairness analysis of the tender offer. The last page of the Board Book contained a chart, entitled "Selected Semiconductor Transactions," which listed, based on publicly available information, the premiums received in 17 transactions involving semiconductor companies between 2010-2014. Pet. App. 31a; JA 219.

The one-page chart, also known as the "Premium Analysis," Pet. App. 31a, did not contain any qualitative assessment of the transactions listed, and did not compare the transactions with Avago's tender offer. It simply showed that the 26.4% premium on the share price under Avago's tender offer was within the range of transaction premiums identified in these unrelated semiconductor transactions, below the mean and median. *Id.* at 31a, 39a.

After receiving this information (and having failed to secure an order enjoining the merger), Respondents amended their complaint to allege that, by failing to include the Selected Semiconductor Transactions chart in the Recommendation Statement, Emulex and the other petitioners (the companies involved in the transaction and individual directors of Emulex) violated Section 14(e) of the 1934 Act. According to the amended complaint, the omission of the chart "create[d] the materially misleading impression that the premium Emulex's shareholders received was significant, or at the very least in line with premiums obtained in similar transactions." JA 181-82 ¶ 8. The

amended complaint sought both damages and an order rescinding the transaction. JA 232-33.

Emulex moved to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that Respondents had failed to adequately plead their Section 14(e) claim, including as to the requisite scienter. Mot. to Dismiss Am. Compl. (C.D. Cal. Oct. 13, 2015), ECF No. 30; *see* JA 12-13. On January 13, 2016, the district court granted the motion and dismissed the amended complaint with prejudice. Drawing from the "wealth of persuasive case law" holding that Section 14(e) requires a showing of scienter, the court rejected Respondents' argument that "only negligence" is required. Pet. App. 36a, 35a. It observed that "*no* federal court has held that § 14(e) requires only a showing of negligence," and concluded that "the better view is that the similarities between Rule 10b-5 and § 14(e) require a plaintiff bringing a cause of action under § 14(e) to allege scienter." *Id.* at 36a.

Applying this standard, the district court found that the amended complaint was insufficient. *Id.* at 38a. As the court explained, "[n]othing in the Recommendation Statement contradicts the information in the [chart]." *Id.* at 28a. Instead, all the chart showed was that "the Emulex premium was below-average for the industry but within a reasonable range of outcomes." *Id.* at 40a. The best explanation for the chart's omission, the district court determined, was not fraud, but rather a basic recognition that the chart's findings were "unremarkable," insignificant, and "minor in the scheme of the voluminous analysis performed by Goldman Sachs." *Id.* at 45a. Thus, the district court concluded that the amended complaint failed to plead

facts evincing "a strong inference of scienter," as required by the PSLRA, and ordered the dismissal of Respondents' claims with prejudice. *Id.* at 57a.

C. Decision Below

On appeal, a panel of the Ninth Circuit reversed, holding that, to prevail in an inferred private action under Section 14(e), a plaintiff need prove "only negligence, not scienter." *Id.* at 16a.

The Ninth Circuit recognized that this ruling diverged from decades of precedent—including decisions by the Second, Third, Fifth, Sixth, and Eleventh Circuits—holding that scienter is required. According to the Ninth Circuit, however, these other circuits had erred in focusing on "the shared text found in both Rule 10b-5 and Section 14(e)" reflecting an antifraud focus. *Id.* at 9a. Instead, the Ninth Circuit held, the language in Section 14(e)'s first sentence must be broken down into discrete parts that establish different standards of care: while a claim rooted in the "fraudulent, deceptive, or manipulative" clause requires a showing of scienter, a claim sounding in the "untrue statement" or omission clause requires only negligence. *Id.* at 8a-9a.

The Ninth Circuit also pointed to this Court's decisions in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), and *Aaron v. SEC*, 446 U.S. 680 (1980). It reasoned that, in *Ernst & Ernst*, the Court had observed that the language of Rule 10b-5 (which is similar to the language of Section 14(e)) could be read to require only negligence, even though the Court ultimately held that Rule 10b-5 requires scienter. Pet. App. 10a-11a (citing 425 U.S. at 212). In *Aaron*, meanwhile, this Court held that when the SEC brings an express claim for injunctive relief under Section

17(a)(2) of the 1933 Act, 15 U.S.C. § 77q(a)(2), the SEC need *not* establish scienter. 446 U.S. at 697.

The Ninth Circuit denied Petitioners' petition for rehearing en banc. Pet. App. 58a-59a.[2]

SUMMARY OF ARGUMENT

The Ninth Circuit erred in holding that Section 14(e) of the 1934 Act supports an inferred private right of action based on mere negligence.

I. Because the Constitution commits the lawmaking power to Congress, private rights of action, just like substantive federal law itself, must be created by Congress. Although there was a time when the Court freely inferred private rights, it has since made clear it has "sworn off th[at] habit." *Sandoval*, 532 U.S. at 287. That course correction has had two effects. First, the Court has consistently refused to *create* new inferred private rights of action, and second, the Court has consistently refused to *extend* the scope of private rights that had been previously inferred. Each of those fundamental restraints demands reversal of the Ninth Circuit's decision here.

II. Even accepting the Ninth Circuit's baseline premise that an inferred private remedy exists under Section 14(e), the Ninth Circuit erred in extending that inferred remedy to mere negligence.

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[2] Respondents also brought claims under Sections 14(d)(4) and 20(a) of the 1934 Act. The district court held that the former claim should be dismissed on the ground that Section 14(d)(4) does not create a private right of action. Pet. App. 55a. The Ninth Circuit affirmed that ruling, *id.* at 18a-19a, and it is not at issue here. The parties agree that Respondents' Section 20(a) claim, which seeks to hold the individual directors of Emulex liable for any federal securities violation as "controlling persons," rises or falls with their Section 14(e) claim. *Id.* at 6a & n.2, 19a.

A. The text of Section 14(e) lacks any affirmative indication of a negligence remedy. That omission is particularly telling because Congress plainly knew how to express a negligence regime when it wanted to—*e.g.*, by referring to concepts of "reasonable care," as it did in Section 12(a) of the 1933 Act. At the same time, Section 14(e) *does* have language unmistakably linked with intentional conduct—*e.g.*, "fraudulent," "deceptive," and "manipulative." "Untrue statement[s]" and "misleading" omissions also go hand-in-hand with intentional deceptions. But in any event, those words must be read in context, informed by Congress's nearby use of "fraudulent," "deceptive," and "manipulative," which put them in an antifraud light as well. None of this is surprising. Section 14(e) was modeled on the antifraud provisions of Section 10(b) of the 1934 Act and Rule 10b-5, which, all agree, require scienter. *Ernst & Ernst*, 425 U.S. at 212-14.

B. The surrounding provisions of the securities laws powerfully confirm that Congress did not intend a private negligence remedy under Section 14(e). When Congress wanted to create a cause of action for negligence, it did so—expressly. And when it did, it imposed significant procedural restrictions on such actions that are inapplicable to Section 14(e), such as providing for recovery of attorney's fees and costs for baseless claims. Moreover, extending an inferred private right of action under Section 14(e) to negligence would nullify other express causes of action. For example, permitting Respondents here to sue for negligence via an implied private right under Section 14(e) would effect an end run around the express cause of action established by Section 18 of the 1934 Act, which applies to alleged inaccuracies in

documents like Recommendation Statements but does not permit recovery for negligence.

C. This Court's conclusion that Section 17(a) of the 1933 Act permits recovery for negligence in an action brought by the SEC does not compel a different reading of Section 14(e) when it comes to the scope of any inferred private right of action. *See Aaron*, 446 U.S. at 697. Because *Aaron* involved claims brought by the SEC under an express cause of action, *Aaron* did not confront the unique concerns with creating or extending inferred private remedies. The text of Section 17(a) and Section 14(e) also differs in ways that suggest that scienter is required under Section 14(e). For example, the prohibitions in Section 17(a) are delineated as separately numbered subparagraphs, which counteracts the force of the associated-words canon; Section 14(e), by contrast, contains a single sentence in which prohibited conduct is strung together. In any event, because Section 14(e) was modeled on Rule 10b-5, the better fit for this case is *Ernst & Ernst*, not *Aaron*, and *Ernst & Ernst* confirms that scienter is required.

D. The practical consequences of expanding an inferred private cause of action under Section 14(e) to negligence also compel rejection of the Ninth Circuit's decision. As this Court has recognized, vexatious litigation driven by efforts to extract settlements of even baseless claims is already a problem in this area. Allowing plaintiffs' lawyers to bring negligence class actions under Section 14(e) in connection with mergers and acquisitions would just supercharge that dynamic—and hike the "merger tax" that private securities litigation has already imposed on such transactions. Moreover, allowing private claims for negligence under Section 14(e) also would create new

classes of potential defendants, including investment bankers and stock analysts. Such litigation would introduce a new set of potential abuses.

III. The Ninth Circuit's decision to create an inferred private right under Section 14(e) for negligence also fails because, as a matter of first principles, there is no basis for inferring a private right of action under Section 14(e) at all, no matter *what* conduct Section 14(e) covers.

A. Imagining an inferred private right of action for negligence under Section 14(e) just underscores that the lower courts never should have inferred any private right of action under Section 14(e) in the first place. Indeed, after this Court held in *Aaron* that Section 17(a)(2) of the 1933 Act proscribes negligent conduct, lower courts that had inferred a private right of action under Section 17(a) reconsidered their past decisions and concluded that there was no justification for inferring a private right of action under Section 17(a) at all. The same conclusion would follow here for Section 14(e), if it were read to cover negligent misstatements or omissions.

B. Section 14(e) also readily flunks the two requirements that this Court has looked to in deciding whether Congress intended to create a private right of action. First, Section 14(e) lacks the "rights creating" language this Court has held is critical to the recognition of private rights. Instead of focusing on the benefitted class, the statute is framed as a general prohibition. Second, and in any event, Section 14(e) evidences no intent whatsoever to create a private remedy. Instead of authorizing (or even alluding to) private enforcement action, Section 14(e) authorizes the *SEC* to undertake an enforcement role. Moreover, as discussed, the securities laws make

quite clear that, when Congress wanted to create a private enforcement mechanism, it did so expressly.

C. Neither the fact that Section 14(e) was enacted amidst the judicial heyday for inferring private rights nor the fact that lower courts have previously inferred a private right of action under Section 14(e) provides any basis for this Court to recognize any inferred right here. This Court has refused to apply any less demanding standard for determining whether a private right may be inferred based on when the underlying statute was passed. Nor is there any basis to water down the inquiry just because lower courts have already inferred a private right under Section 14(e). That is particularly true given that no lower court that has inferred such a right has subjected Section 14(e) to the rigors of this Court's modern precedent. "Grandfathering" private rights that have been inferred by the lower courts is just as baseless as creating inferred private rights to begin with.

The Ninth Circuit's decision should be reversed.

ARGUMENT

I. THE CONSTITUTION SHARPLY LIMITS JUDICIAL AUTHORITY TO CREATE OR EXTEND PRIVATE CAUSES OF ACTION

The Constitution assigns the "legislative Powers" to Congress. U.S. Const. art. I, § 1. Like the creation of "substantive federal law itself," therefore, "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1413 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("Deciding that, henceforth, persons like A who engage in certain

conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law. And in our constitutional order the job of writing new laws belongs to Congress, not the courts.").

For the better part of the twentieth century, the lower courts, and even this Court itself, struggled to heed this limit. Indeed, far from policing this constitutional limit, the Court took a "hospitable attitude towards implied rights of action." *Thompson v. Thompson*, 484 U.S. 174, 190 (1988) (Scalia, J., concurring in the judgment). No case better exemplifies that attitude than *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). There, the Court inferred a private right of action under Section 14(a) of the 1934 Act. *Id.* at 427. Although the Court readily acknowledged that Section 14(a) "makes no specific reference to a private right of action," *id.* at 432, it saw it as its "duty" to infer such remedies as are necessary to effectuate the purposes of the Act, *id.* at 433.

In the decades that followed, however, this Court came to reject this understanding of the role of the judiciary as fundamentally inconsistent with the Constitution's delegation of lawmaking power (solely) to Congress. And so the Court changed course. As Justice Scalia wrote for the Court in *Sandoval*, the Court "abandoned [*Borak*'s] understanding in *Cort v. Ash*, 422 U.S. 66, 78 (1975) . . . and ha[s] not returned to it since. . . . Having sworn off the habit of venturing beyond Congress's intent, we will not accept [an] invitation to have one last drink." 532 U.S. at 287. Instead, the Court held, "private rights of action to enforce federal law must be created by Congress," not by the courts, "no matter how desirable [they] might be as a policy matter." *Id.* at 286-87.

That course correction has manifested itself in two important (and related) ways: First, the Court has consistently refused to *create* any new inferred private causes of action that its earlier cases did not already establish, and, second, the Court has consistently refused to *extend* previously recognized inferred causes of action any further than they already reach. *See, e.g.*, *Jesner*, 138 S. Ct. at 1402 (noting that the "Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law"); *Thompson*, 484 U.S. at 190 (Scalia, J., concurring in the judgment) (citing cases illustrating this trend).[3]

The Court's refusal either to create new inferred private rights or to expand ones that had been inferred in the "bad old days" is hardly surprising. All of the "[c]oncerns with the judicial *creation* of a private cause of action caution against its *expansion*," too. *Janus Capital Grp., Inc. v. First Derivative*

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[3] *See also, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) ("Given the notable change in the Court's approach to recognizing implied causes of action, . . . the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." (citation omitted)); *Wilkie v. Robbins*, 551 U.S. 537, 549-50 (2007) (refusing to infer private cause of action "for retaliating against the exercise of ownership rights"); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (refusing to infer private cause of action against private entities for violating constitutional rights while acting under color of federal law); *see also Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 296 (1993) (Thomas, J., dissenting) ("In the absence of any compelling reason to allow contribution in private 10b-5 suits, we should seek to keep the breadth of the 10b-5 action from 'grow[ing] beyond the scope congressionally intended" (alteration in original) (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991))).

Traders, 564 U.S. 135, 142 (2011) (alteration in original) (emphasis added) (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008)); *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991) ("Assessing the legitimacy of any such *extension* [of the scope of an inferred cause of action] calls for the application of [the same] fundamental principles governing recognition of a right of action implied by a federal statute . . . ." (emphasis added)).

This case tests both the expansion and, ultimately, creation of inferred private rights. Because the Ninth Circuit considered this case against the baseline of its prior precedent recognizing an inferred private right of action under Section 14(e) for conduct involving scienter, the court (and parties) focused below on whether that inferred private right could be *extended* to mere negligence. As explained in Part II of this brief, even accepting that baseline premise, the Ninth Circuit erred in expanding its inferred right under Section 14(e) to cover negligence. But there is an even more fundamental problem with the Ninth Circuit's decision: As explained Part III of this brief, there is no basis for creating any inferred private right of action under Section 14(e) to begin with. Either way, the Ninth Circuit's decision cannot stand.

II. THE NINTH CIRCUIT ERRED IN EXTENDING ITS PREVIOUSLY INFERRED PRIVATE RIGHT OF ACTION UNDER SECTION 14(e) TO NEGLIGENCE

Lower courts first inferred a private right of action under Section 14(e) more than forty years ago, while the free-wheeling era of inferring private rights epitomized by *Borak* was in full swing. Until the

Ninth Circuit's decision in this case, however, every court that had inferred a cause of action under Section 14(e) held that it required scienter. Even assuming the existence of an inferred private right of action under Section 14(e) requiring scienter (an issue to which we return in Part III below), the Ninth Circuit erred in holding that this inferred right of action could be extended to reach mere negligence.[4]

A. The Text Of Section 14(e) Does Not Support, Much Less Compel, Inference Of A Private Negligence Remedy

This Court has held that "'affirmative' evidence of congressional intent must be provided *for* an implied remedy, not against it, for without such intent 'the essential predicate for implication of a private remedy simply does not exist.'" *Sandoval*, 532 U.S. at 293 n.8 (citation omitted). As a result, an inferred cause of action may not be extended "beyond the ambit" previously recognized, unless there is affirmative evidence that the broader "scope [was] congressionally intended." *Virginia Bankshares, Inc.*, 501 U.S. at 1102. That inquiry centers on the text of the statute that Congress actually enacted.

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[4] As explained below, the Ninth Circuit not only extended the private right of action that it had previously inferred under Section 14(e) in cases like *Polinsky v. MCA Inc.*, 680 F.2d 1286, 1291 (9th Cir. 1982), to a broad new range of conduct (negligence), but, in doing so, it also created a whole new class of potential defendants. *See infra* at 33-34. Indeed, by going from scienter to negligence the Ninth Circuit effectively created a new private cause of action under Section 14(e) altogether.

1. Section 14(e) lacks any affirmative evidence of a negligence standard

The first thing that is apparent on the face of Section 14(e) is that it does not explicitly specify a negligence standard. It sets out, in a single sentence, a substantive proscription against various kinds of false and deceptive acts—namely, making "any untrue statement of a material fact," "omit[ting] to state any material fact necessary in order to make the statements made . . . not misleading," "fraudulent . . . acts or practices," "deceptive . . . acts or practices," "or manipulative acts or practices." 15 U.S.C. § 78n(e). To state the obvious, Congress did not express any intent to proscribe "negligence" in any respect.

Also missing from Section 14(e) is the kind of "reasonableness" language that Congress used elsewhere in the securities laws, which is often associated with negligence. For example, Section 12(a) of the 1933 Act refers to one who "did not know, and in the exercise of reasonable care could not have known, of [the] untruth or omission" that gave rise to the securities law violation in question. 15 U.S.C. § 77*l*(a)(2); *see also id.* § 77k(c) (using "reasonableness" standard for purposes of Section 11). There is nothing like that in Section 14(e).

As this Court has recognized, these provisions (among others) show that Congress knows how to adopt "a negligence standard" when it wants to. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976). The fact that Congress did not use such language in Section 14(e) is thus a strong, if not conclusive, sign that Congress did not intend to adopt a negligence standard for Section 14(e). *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,

511 U.S. 164, 177 (1994) ("If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text."); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) ("When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly.").

The fact that Section 14(e) proscribes "untrue statement[s]" and "misleading" omissions, as well as "fraudulent, deceptive, or manipulative acts," does not compel a different reading. Nothing about proscribing an "untrue statement" or "misleading" omission inherently bespeaks negligence. And that is particularly true where, as here, Congress omits the kind of "reasonableness" language that it uses when it does intend a negligence standard. The use of "untrue statement" or "misleading" omission, standing alone, does not *rule out* a negligence standard. But at best, this language—in isolation—is neutral as to what standard of care applies. It provides no affirmative evidence that Congress actually intended to reach negligence.[5]

In short, there is no affirmative evidence that Congress intended a negligence standard.

2. Instead, the text indicates that Congress intended to require scienter

In fact, the language that Congress used in Section 14(e) affirmatively indicates that Congress intended a scienter, and not a negligence, standard.

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[5] In fact, as explained below, Congress's use of "untrue" and "misleading" is consistent with Congress's focus on fraudulent—*i.e.*, intentional—conduct. *See infra* at 26.

Notably, while Section 14(e) omits language associated with negligence, it *has* language unmistakably linked with a scienter standard: Not only the word "fraudulent," but also "deceptive" and "manipulative"—terms that this Court has held "connote[] intentional or willful conduct designed to deceive or defraud investors," which is "a type of conduct quite different from negligence." *Ernst & Ernst*, 425 U.S. at 199. In *Ernst & Ernst* this Court pointed to the use of such language in Section 10(b) as evidence that Congress did *not* intend a negligence standard. *Id.* at 198-99, 212. There is no reason to reach a different conclusion here.

"Untrue" and "misleading" can likewise be used to refer to intentional deception as distinct from merely negligent mistakes. While there are alternative definitions, "untrue" can mean "Dishonest," and "misleading" can mean "deceptive. "Untrue, adj. and adv.," OED Online (Dec. 2018), https://www.oed.com/view/Entry/219141 (last accessed Feb. 16, 2019); "Misleading, adj.," OED Online (Dec. 2018), https://www.oed.com/view/Entry/119745 (last accessed Feb. 16, 2019). Those definitions are consistent with requiring scienter, and fit naturally with the surrounding language in Section 14(e).

The Ninth Circuit did not dispute that Congress's use of words like "fraudulent," "deceptive," and "manipulative" indicates a scienter standard. But it believed that "untrue" and "misleading" must be read in isolation and given their broadest possible meaning. Rather than read the first sentence of Section 14(e) to share a common scienter standard, therefore, it walled off what it called the "first clause" of the sentence—encompassing the prohibition on "untrue statements" and "misleading" omissions—

from what it called the "second clause" of the sentence—encompassing the "fraudulent," "deceptive," and "manipulative" language. Pet. App. 8a, 12a, 24a.[6] It conceded that "a heightened showing of culpability is required" under "the second clause," but held that "a lesser showing of culpability will suffice" for "the first clause." *Id.* at 24a.

The Ninth Circuit's effort to hermetically seal the "first clause" of Section 14(e) violates two cardinal canons of statutory construction. The first is the "whole-text canon," "which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). The Ninth Circuit's refusal to read the first sentence of Section 14(e) *as a whole*, and to read the sentence's "first clause" in light of the "second clause," and vice versa, is a classic violation of this canon.

Second, and relatedly, the Ninth Circuit violated the "associated-words canon." *See id.* at 196. This is the rule that words generally are "known by the company [they] keep[]," *Yates v. United States*, 135 S.

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[6] The Ninth Circuit added numerical subdivisions of its own to divide up the sentence, as follows:

> It shall be unlawful for any person [1] to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, *or* [2] to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . .

Pet. App. 8a (quoting 15 U.S.C. § 78n(e) (alterations in original)).

Ct. 1074, 1085 (2015) (plurality); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). This canon is especially strong where, as here, all of the words are set out in a single sentence with no structural divisions that might suggest Congress had in mind materially different concepts. The use of commas and "or" does not qualify as such a division, because commas and "or" are used with synonymous concepts just as they are used with disjunctive concepts (as their use between "fraudulent, deceptive, or manipulative" in Section 14(e) underscores).

Thus, while "untrue" and "misleading" *could* be read in the abstract to mean simply "not accurate," that is not the best reading of those words in the context in which they appear in Section 14(e). Instead, in light of the rest of the sentence, "untrue" is better given its definition of "dishonest," and Congress's use of "misleading" is better given its definition of "deceptive"—both of which suggest intentional deceptions rather than negligence. *See supra* at 26. Reading Section 14(e) in that way, its single conduct-regulating sentence contains a single state-of-mind requirement—scienter.[7]

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[7] The second sentence of Section 14(e) only reinforces that conclusion. That sentence grants the SEC rulemaking authority to "define, and prescribe means reasonably designed to prevent, such acts and practices as are *fraudulent, deceptive, or manipulative*." 15 U.S.C. § 78n(e) (emphasis added). Because that sentence was enacted two years after the first sentence (*see supra* at 6), it lacks the same interpretive force as the use of similar words in the first sentence of Section 14(e) itself. But the second sentence nevertheless underscores that Section 14(e) is focused on conduct that typically entails scienter. The legislative history of the Williams Act itself—which enacted the first sentence of Section 14(e)—also reinforces this conclusion. Both of the Committee Reports to that Act describe the conduct

Respondents themselves have conceded (BIO 15) that if one divides the first sentence of Section 14(e) into a "first clause" and a "second clause," as the Ninth Circuit did, then "[t]he first clause . . . does not expressly require . . . *any* specific state of mind." And given that no one in this case has seriously suggested that Section 14(e) imposes a strict liability standard, that lack of any alternative *mens rea* language is telling: All agree that either a scienter standard or a negligence standard must apply to all violations of Section 14(e), all agree that Section 14(e) includes terms that expressly require a scienter standard, and *no one* contends that Section 14(e) contains terms that expressly authorize a negligence standard. Given those three undisputed points, it is easy to see how every other court to have ever addressed the question concluded that scienter is required for claims under Section 14(e), no matter which clause applies.

3. The Court's interpretation of Section 10(b) and Rule 10b-5 strongly supports this reading

The conclusion that the text of Section 14(e) supports a scienter standard is all the more compelling in light of this Court's decision in *Ernst & Ernst*, interpreting the similar language in Rule 10b-5. 425 U.S. at 212-14. There, this Court stated that, while "[v]iewed in isolation[,] the language of

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covered by Section 14(e), including its prohibition of material misstatements and omissions, under the heading of "*fraudulent* transactions." *See* H.R. Rep. No. 90-1711, at 11 (1968) (emphasis added); Senate Report at 10 (same). And this Court itself has previously observed that the first sentence of Section 14(e) "prohibits fraudulent acts in connection with a tender offer." *United States v. O'Hagan*, 521 U.S. 642, 667 (1997).

subsection (b) [of Rule 10b-5], . . . could be read as proscribing . . . any type of material misstatement or omission . . . whether the wrongdoing was intentional or not," the *better* reading of subsection (b) was that it "was intended to apply only to activities that involved scienter." *Id.* at 212. Since Section 14(e) was "modeled on the antifraud provisions of . . . Rule 10b-5," *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10 (1985), it follows that Congress intended Section 14(e) to apply only to conduct that involved scienter, too.

The Ninth Circuit dismissed the significance of *Ernst & Ernst* by pointing out that Rule 10b-5 "is a regulation promulgated under Section 10(b) of the Exchange Act, which allows the SEC to regulate *only* 'manipulative or deceptive device[s].'" Pet. App. 11a-12a (quoting 15 U.S.C. § 78j(b)). But that proves the point: The SEC, knowing that it was limited to addressing only "manipulative or deceptive device[s]," chose to use the "untrue" and "misleading" language of Rule 10b-5 in order to accomplish that purpose. Congress then used that Rule targeting intentional conduct as the "model[]" for Section 14(e). *Schreiber*, 472 U.S. at 10. And there is no indication whatsoever that, in modeling Section 14(e) on Rule 10b-5, Congress intended to use the same words to capture a far broader set of inaccurate statements or omissions—*i.e.*, ones that were merely negligent.[8]

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[8] Respondents have never argued that the SEC exceeded its rulemaking authority by promulgating subparagraph (b) of Rule 10b-5, on the theory that subsection (b), like the parallel language in Section 14(e), extends to mere negligence. And the only result that would be more radical than extending the previously inferred cause of action under Section 14(e) to negligence would be holding that Rule 10b-5(b)—one of the most

B. The Structure And Surrounding Provisions Confirm That Congress Did Not Intend A Private Negligence Remedy

Under *Sandoval* and the other cases discussed above, the lack of clear textual support for the extension of any inferred cause of action alone requires reversal of the Ninth Circuit's decision. But, in any event, the structure and surrounding provisions of the securities laws independently confirm that the Ninth Circuit overreached.

1. Where Congress authorized private suits based on negligence, it provided additional procedural protections absent from Section 14(e)

In rejecting the argument that the inferred private right of action under Section 10(b) of the 1934 Act should be extended to merely negligent conduct, this Court looked to the surrounding provisions of the securities laws to help it answer the question. *See Ernst & Ernst*, 425 U.S. at 206-11. Several things stood out to the Court there—and the same considerations apply with equal force here.

First, "[e]ach of the provisions of the 1934 Act that expressly create civil liability, except those directed to specific classes of individuals such as directors, officers, or 10% beneficial holders of securities, contains a state-of-mind condition requiring something more than negligence." *Id.* at 209 n.28 (citations omitted); *id.* (discussing the express liability provisions in 15 U.S.C. § 78i(e) (1976) (former

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commonly invoked enforcement tools under the federal securities laws—is *ultra vires*, and thus, invalid.

Section 9(e), now codified at Section 9(f), 15 U.S.C. § 78i(f))), *id.* § 78r (Section 18), *id.* § 78t (Section 20)).

Second, when Congress did want to create a cause of action based on negligence (as it did in the 1933 Act), it did so expressly. For example, the express cause of action established by Section 11 of the 1933 Act explicitly sets forth a "due diligence" defense, which, "[i]n effect, . . . is a negligence standard." *Id.* at 207-08 (discussing 15 U.S.C. § 77k(b)(3)(B)(i) (1976)). From this, the Court found that "[t]he express recognition of a cause of action premised on negligent behavior . . . stands in sharp contrast to the language of § 10(b), and significantly undercuts the Commission's argument" in favor of a negligence standard for Section 10(b). *Id.* at 208.

And *third,* Congress subjected each of these express causes of action for negligence to "significant procedural restrictions." *Id.* at 208-09 (citation omitted). A plaintiff suing under Section 11 of the 1933 Act based on alleged negligent misstatements in a registration statement, for example, can be required to provide a bond sufficient to cover the opposing party's anticipated costs, including attorney's fees, and can be required to pay those costs (including attorney's fees) if the court later determines that the suit was "without merit." 15 U.S.C. § 77k(e). The same goes for a plaintiff suing under Section 12 of the 1933 Act based on alleged negligent misstatements in a prospectus. These protections were added "to deter actions brought solely for their potential settlement value" under the express causes of action covering negligence. *Ernst & Ernst,* 425 U.S. at 210 n.30.

In *Ernst & Ernst,* the Court concluded that, in light of these express procedural limitations, "the judicially created private damages remedy under

§ 10(b)—which has no comparable restrictions—cannot be extended, consistently with the intent of Congress, to actions premised on negligent wrongdoing." *Id.* at 210 (footnote omitted). Each of those factors applies equally to the private right of action inferred here under Section 14(e) and, thus, bolsters the conclusion that a negligence standard would be inconsistent with the intent of Congress.

And there is an additional contrast here. When Congress allowed recoveries for negligent misstatements elsewhere in the securities laws, it expressly limited the type of statements covered or the class of defendants subject to the claim. Claims under Section 11, for example, are limited to inaccuracies in a single document—the registration statement—that need only be filed with the SEC upon issuance of new securities. *See* 15 U.S.C. § 77k(a). Claims under Section 12(a)(2), meanwhile, can only be brought against one class of defendants: the person from whom the plaintiff purchased the security; purchasers in the open market cannot sue based on a claim that inaccurate statements affected the price at which they bought securities from, or sold securities to, other people. *Id.* § 77*l*(a)(2).[9]

Section 14(e), by contrast, applies to *all* statements made "in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation," and contains no requirement that the defendant have been personally

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[9] Similarly, under Section 17(a)(2) of the 1933 Act, the SEC can sue for negligent violations only by defendants who used a misleading statement or omission "to obtain money or property." 15 U.S.C. § 77q(a)(2); *see infra* at 36-37.

involved in the purchase or sale transaction at issue. 15 U.S.C. § 78n(e). By its terms, therefore, Section 14(e) could be invoked to challenge a fairness opinion issued by an investment banker, investment advice by a stock analyst, or even an allegedly inaccurate news story about the terms of a proposed merger by a financial journalist or TV commentator.

Historically, damages claims based on such things have not been viable even in circuits that have recognized an inferred cause of action under Section 14(e) because of the need to prove scienter. If this Court were to embrace an inferred cause of action extending to any negligently inaccurate statements made in connection with a tender offer, however, such suits—and, perhaps more importantly, the *threat* of such suits in the face of unfavorable coverage—would be fair game. As Judge Friendly observed in analogous circumstances, the implications of such a regime would be "frightening." *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 866-67 (2d Cir. 1968) (concurring), *cert. denied*, 394 U.S. 976 (1969).

2. Allowing private recoveries under Section 14(e) based on negligence would circumvent the express cause of action in Section 18 of the 1934 Act

In *Ernst & Ernst*, this Court also expressed concern that extending the inferred private right of action under Section 10(b) to suits based on negligence would cause suits that *could* have been brought under the express causes of action in the securities laws to instead be brought under the inferred cause of action, "and thereby nullify the effectiveness of the carefully drawn procedural

restrictions on these express actions." 425 U.S. at 210. Again, the same is true for Section 14(e).

And this case is a perfect example. Respondents allege that Petitioners "caus[ed] a materially incomplete and misleading [Recommendation Statement] to be filed with the SEC." JA 178 ¶ 2. Respondents assert that as a result of the allegedly misleading Recommendation Statement, they sold their Emulex shares to Avago for less than they otherwise would have. JA 180-82 ¶¶ 7-8. But Section 18 of the 1934 Act establishes an express private cause of action for just such claims. *See* 15 U.S.C. § 78r(a) ("Any person" who makes a false or misleading statement in any "document filed pursuant to this chapter or any rule or regulation thereunder . . . shall be liable to any person . . . who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages . . . .").

Yet, Respondents chose to sue instead under the inferred cause of action that the Ninth Circuit had derived from Section 14(e). One can surmise several reasons why. At the outset, Section 18 claims are subject to procedural protections similar to those that apply to claims under Section 11 and 12 of the 1933 Act, while Section 14(e) claims are not. *See* 15 U.S.C. § 78r(a) (district court may "assess reasonable costs, including reasonable attorneys' fees," in action under Section 18). And more substantively, Section 18 expressly forecloses liability based on mere negligence. *See Ernst & Ernst*, 425 U.S. at 211 n.31; *see also* 15 U.S.C. § 78r(a) (no liability if defendant "acted in good faith and had no knowledge that such statement was false or misleading").

The Ninth Circuit's expanded, inferred private right of action under Section 14(e) for mere negligence thus allows an end run around the limits that Congress imposed on the express cause of action it created for the alleged wrongdoing here.

C. *Aaron v. SEC* Does Not Compel Extending Any Inferred Cause Of Action Under Section 14(e) To Negligence

Notwithstanding the foregoing evidence that Congress did not intend an inferred private remedy for negligence under Section 14(e), the Ninth Circuit believed that a decision of this Court (*Aaron*, 446 U.S. 680) interpreting a different provision (Section 17(a) of the 1933 Act) compelled it to recognize such an inferred private right. Pet. App. 13a. It was incorrect.

Aaron arose from a suit by the SEC under the express cause of action established by Section 20(b) of the 1933 Act for injunctive relief. 15 U.S.C. § 77t(b) (1976). The Commission claimed that, in undertaking a sales campaign for securities, Aaron had violated Section 17(a) of the 1933 Act as well as Section 10(b) of the 1934 Act and Rule 10b-5. The question was whether the SEC was required to establish scienter before an injunction could issue to prevent further violations of those provisions. 446 U.S. at 682. In light of *Ernst & Ernst*, the Court held that scienter was required under Section 10(b) and Rule 10b-5, *id.* at 689-96, but it held that negligence was sufficient under Section 17(a)(2) and (3), *id.* at 696-701.

Section 17(a) contains three separately numbered subparagraphs—(1), (2), and (3)—and addresses "untrue statement[s]" and "misleading" omissions in subparagraph (2), separately from the provision addressing "any device, scheme, or artifice to defraud"

set out in subparagraph (1). *See* Add. 9 (reprinting Section 17(a), 15 U.S.C. § 77q(a)). In *Aaron*, the Court concluded that "Congress drafted § 17(a) in such a manner as to compel the conclusion that scienter is required under one subparagraph"—the first one—"but not under the other two." 446 U.S. at 697.

According to the Ninth Circuit, this Court's conclusion that the SEC need not prove scienter in order to obtain an injunction against violations of subparagraph (2) of Section 17(a) compels the conclusion that a private plaintiff need not prove scienter in order to recover damages in an implied right of action brought under "the first clause of Section 14(e)" of the 1934 Act, because both provisions use the words "untrue statement" and "misleading" omission. *See* Pet. App. 12a-13a. But that analysis overlooks three key distinctions between this case and *Aaron*, any one of which calls for a different result.

First, while similar in some respects, the language of Section 14(e) and Section 17(a) differ in an obvious respect. Not only are the clauses jumbled, but when Congress drafted the conduct-regulating portion of Section 14(e) it used a single sentence—and omitted the numbered subparagraphs that this Court emphasized in *Aaron*. *See supra* at 27-28; *see also, e.g.*, *Aaron*, 446 U.S. at 697 (emphasizing "subparagraph[]" structure of Section 17(a)); *United States v. Naftalin*, 441 U.S. 768, 773-74 & n.5 (1979) (pointing to "the use of separate numbers to introduce each subsection" in Section 17(a)). The omission of numerical subparagraph dividers in Section 14(e) strengthens the case for reading its first sentence as a whole and in light of its focus on fraudulent acts.

Second, the history of these provisions differs, too. Congress enacted Section 17(a) in 1933—before there

was a Rule 10b-5. By contrast, Section 14(e), which was enacted in 1968, was "modeled on the antifraud provisions of § 10(b) and Rule 10b-5." *Schreiber*, 472 U.S. at 10. That chronology is significant because, as the Court recognized in *Ernst & Ernst*, Section 10(b) and Rule 10b-5 require a showing of scienter; if Congress modeled Section 14(e) on Rule 10b-5, then it presumably intended the same scienter requirement. As the Court noted in *Aaron*, however, it was not bound by that "precedential authority" (*Ernst & Ernst*) in construing Section 17(a). 446 U.S. at 695.[10]

And *third*, the nature of the actions in this case and *Aaron* differ in a fundamental respect as well. *Aaron* involved an express cause of action entitling the SEC to injunctive relief in the public interest. It was enough in *Aaron*, therefore, that the text of Section 17(a)(2) did not specifically demand a showing of scienter. *Id.* at 696. The Court had no need to look for the "'affirmative' evidence of congressional intent" that it demands before extending an *inferred* cause of action to a new category of conduct. *Sandoval*, 532 U.S. at 293 n.8 (citation omitted); *see supra* at 19-22. Nor did *Aaron* need to consider the contrasts with the express causes of action predicated on negligence that the Court had relied on in *Ernst & Ernst* when

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[10] Respondents claim this argument is "iron[ic]," because "Rule 10b-5 was modeled after Section 17." BIO 18 n.9. But in *Ernst & Ernst* and *Aaron*, this Court itself has already recognized a difference between Rule 10b-5 and Section 17 when it comes to scienter. That difference will persist no matter how this case is decided. And the relevant point here is that Congress modeled Section 14(e) on Rule 10b-5, not Section 17. *See Schreiber*, 472 U.S. at 10. There is no evidence that, in basing Section 14(e) on Rule 10b-5, Congress meant to reach much more broadly than the SEC had in Rule 10b-5.

deciding whether to extend the inferred cause of action under Section 10(b) to negligent conduct. *See supra* at 31-34. That different context sheds an entirely different light on the issue here.

To the extent there is any anomaly between holding that Section 14(e)—like Section 10(b) and Rule 10b-5—requires scienter and Section 17(a)(2) does not, it is a product of the different language, structure, and history of these provisions as well as this Court's precedent. *See Aaron*, 446 U.S. at 702-03 (Burger, C.J., concurring). There is no basis to expand any inferred private right of action under Section 14(e) based on the different question answered in *Aaron* as to the express cause of action there. And if this case must fit into any box, it should be *Ernst & Ernst*, not *Aaron*, given that Section 14(e) was modeled on Section 10(b) and Rule 10b-5, and *Ernst & Ernst* involved an implied right of action.

D. Practical Considerations Counsel Strongly Against Extending Any Inferred Cause Of Action Under Section 14(e)

Finally, the "practical consequences" of expanding any inferred private cause of action under Section 14(e) to negligence also warrant rejection of the Ninth Circuit's rule. *Stoneridge Investment Partners*, 552 U.S. at 163; *see Virginia Bankshares, Inc.*, 501 U.S. at 1104; *Blue Chip Stamps*, 421 U.S. at 737.

Because an inferred private action is like "a judicial oak which has grown from little more than a legislative acorn," this Court has recognized that it would be "disingenuous" to suggest that the *boundaries* of such a private cause of action, once created by a court, can only be limited by statutory text. *Blue Chip Stamps*, 421 U.S. at 737. If Congress

did not write down the cause of action in the first place, then it cannot be expected to have written down the responsible limits of that cause of action, either, and "[i]t is therefore proper that we consider . . . what may be described as policy considerations" in deciding where to cut off the judicial creation. *Id.*

As in *Stoneridge Investment Partners,* expanding the inferred private right of action that lower courts have recognized under Section 14(e) would create "a new class of defendants," and new "risks" associated with that litigation. 552 U.S. at 163-64. As discussed above, because Section 14(e) by its terms applies to *all* statements made in connection with a tender offer, extending an inferred private right of action to negligence would permit private suits against anyone who analyzes or simply comments on transactions, including investment bankers, stock analysts, and even financial journalists. *See supra* at 33-34. Such litigation would raise a host of new issues.

Extending an inferred private right of action under Section 14(e) to negligent conduct also would exacerbate problems that already exist. As this Court has long recognized, "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general," including the filing of "nuisance" suits with "little chance of success" brought for their "settlement value," and discovery abuses. *Blue Chip Stamps,* 421 U.S. at 739-41. Efforts to "extort settlements from innocent companies" (*Stoneridge Inv. Partners,* 552 U.S. at 163-64) through such actions have only grown more sophisticated, and more prevalent, over time.

The risk of vexatious litigation is particularly great when it comes to public company mergers and acquisitions, where plaintiffs' lawyers who make it

past the motion to dismiss stage can extract a "merger tax" by threatening to hold up a deal with prolonged litigation, even if that litigation is almost certain to eventually end in defeat. *See* U.S. Chamber Institute for Legal Reform, *The Trial Lawyers' New Merger Tax* 1 (2012), http://bit.ly/newmergertax. Indeed, from 2010 to 2017, there was a five-fold increase in class actions asserting Section 14 claims. *See* Cornerstone Research, *Securities Class Action Filings—2017 Year In Review* 21 (2018), http://bit.ly/Cornerstone2017YIR (showing "M&A Filings" and "Section 11" filings).[11]

Allowing plaintiffs to assert claims for negligence under Section 14(e) would just supercharge this abusive dynamic. Not only would a negligence standard extend the reach of Section 14(e), but courts have held that "negligence is not a state of mind," and that securities complaints premised on negligence therefore need not satisfy the PSLRA's heightened pleading requirements. *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009). Under a negligence-based inferred cause of action, therefore, it would be far easier for plaintiffs to use generalized allegations about what defendants *should have* disclosed to hold up major corporate transactions and extract ever-greater settlements from companies that have done nothing wrong and just want to go about their business. This Court has previously refused to extend judicially created causes of action under the securities

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[11] By contrast, the number of claims brought under Section 11 actually *dropped* during that period to a total of 24 cases in 2017. Cornerstone Research, *supra*, at 21. That is no doubt due in part to the protections discussed above that make plaintiffs who assert meritless negligence claims under Section 11 potentially subject to attorney's fee awards. *See supra* at 32.

laws in ways that would enable such abuses, *see Blue Chip Stamps*, 421 U.S. at 739-45, and should decline to undertake such an expansion again here.

Conversely, on the question whether extending the inferred cause of action to reach the conduct in question is "[]necessary to ensure fulfillment of Congress's purposes in adopting the Act," *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977) (citation omitted), experience readily establishes that the answer is a "no." For the first half-century of Section 14(e)'s existence, no court had ever extended an inferred cause of action under that provision to negligent conduct, and yet there is no evidence that the purposes of Section 14(e) were unfulfilled.

Accordingly, practical considerations also weigh heavily against extension of an inferred private right of action under Section 14(e) to mere negligence.

III. EVEN MORE FUNDAMENTALLY, THE NINTH CIRCUIT NEVER SHOULD HAVE INFERRED ANY RIGHT OF ACTION UNDER SECTION 14(e) TO BEGIN WITH

For the foregoing reasons, the Ninth Circuit erred in expanding the private right of action that court had previously inferred under Section 14(e) to negligence. But the Ninth Circuit's decision rests on an even more fundamental error: There is no basis for inferring a private right of action under Section 14(e) for any conduct, regardless of whether it involves scienter or negligence. Contemplating an inferred private right of action for negligence just underscores that no cause of action should have been inferred at all. Although the Ninth Circuit panel in this case was obligated by its prior precedent to recognize an inferred private

right of action under Section 14(e) as a baseline for deciding this case, this Court certainly is not.[12]

A. If Section 14(e) Really Did Proscribe Negligent Conduct, Then It Plainly Could Not Be Privately Enforceable

Whatever foundation lower courts thought they could find in the 1970s for an inferred private right under Section 14(e) requiring scienter, the entire house comes crumbling down if one adds the weight of a negligence standard to the mix.

As this Court held in *Ernst & Ernst*, the "procedural limitations" Congress imposed on "each of the [Act's] express civil remedies" "indicate that [a] judicially created private damages remedy . . . which has no comparable restrictions—cannot be extended . . . to actions premised on negligent wrongdoing."

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[12] Respondents claim that Petitioners waived the argument that a cause of action may not be implied at all under Section 14(e) by failing to raise it below. BIO 28. Not so. Petitioners raised the argument in their petition for rehearing en banc before the Ninth Circuit, which was the earliest opportunity that the Ninth Circuit could have resolved the issue in Petitioners' favor in light of existing precedent. *See* Pet. for Rehearing En Banc 14 (9th Cir. May 4, 2018), ECF No. 63; *see also Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (a panel is bound by the circuit's prior decisions unless they are "clearly irreconcilable" with "intervening higher authority"). Petitioners then renewed the argument at the certiorari stage as an explicit part of their broader contention that there is no inferred private right for negligence (if there is no inferred private right at all, then there is, of course, no private right for negligence). *See* Pet. i, 20; Cert. Reply 10. The points are simply "separate *arguments* in support of a single claim," *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992)—that there is no inferred private right of action covering the conduct alleged in the complaint. Likewise, both arguments are plainly included within the Question Presented.

425 U.S. at 210 (footnote omitted). Thus, if the Ninth Circuit was correct that Section 14(e) is intended to apply to "negligent wrongdoing," then it becomes unmistakably clear that Congress did not intend the provision to be privately enforceable at all.

That is precisely the conclusion the courts of appeals have reached with respect to the provision the Ninth Circuit offered as the closest analogue to Section 14(e)—Section 17(a) of the 1933 Act. Before this Court's decision in *Aaron*, several courts of appeals had inferred a private right of action under Section 17(a), usually by analogy to Section 10(b). After this Court held in *Aaron* that Section 17(a)(2) and (3) applied to negligent conduct, however, lower courts revisited their precedent and held that, with negligence in the mix, there could be no inferred right of action under Section 17(a) at all.

As the Second Circuit explained, "*Aaron* broke the link between rule 10b-5 and § 17(a)" by holding that, "unlike an action under rule 10b-5, in an action [under Section 17(a)] the SEC did not have to establish scienter." *Finkel v. Stratton Corp.*, 962 F.2d 169, 175 (2d Cir. 1992). "Accordingly," the court reasoned, "we can no longer justify the private right of action under § 17(a) on the ground that rule 10b-5 provides the same cause of action anyway." *Id.* Stripped of this rationale, the court held that it could not imply any private right under Section 17(a). *Id.*

The Fourth, Seventh, and Ninth Circuits all reached the same result using the same reasoning—each overturning their prior precedent and holding that there is no implied right of action under Section 17(a). *See Newcome v. Esrey*, 862 F.2d 1099, 1101 (4th Cir. 1988) (overruling *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975)); *In re Washington Pub. Power Supply*

Sys. Sec. Litig., 823 F.2d 1349, 1354 (9th Cir. 1987) (overruling *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808 (9th Cir. 1981)); *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 943 (7th Cir. 1989).[13]

Ironically, then, if it were accepted, the Ninth Circuit's view that Section 14(e) extends to negligence would knock out a linchpin on which the inferred private right of action rested. Just as the lower courts recognized with respect to Section 17(a), if Section 14(e) really did proscribe negligent wrongdoing, as the Ninth Circuit held, then any basis for implying a private right of action under Section 14(e) would collapse: The upshot of rejecting a standard under which "scienter is required" for "private plaintiffs" is that "there is no private right of action under [Section 14(e)]" at all. *Finkel*, 962 F.2d at 175.

B. This Court's Recent Precedent Clearly Forecloses Inference Of A Private Right Of Action Under Section 14(e)

In any event, there is no basis for inferring any private right of action under Section 14(e) in light of the demands of this Court's modern test for determining whether implied private rights exist. This Court has already recognized that Section 14(e), on its face, "makes no provision whatever for a private cause of action." *Piper v. Chris-Craft Indus., Inc.*, 430

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[13] Five other courts of appeals have likewise concluded that there is no inferred private cause of action under Section 17(a). *See Maldonado v. Dominguez*, 137 F.3d 1, 7 (1st Cir. 1998); *Deviries v. Prudential-Bache Sec., Inc.*, 805 F.2d 326, 328 (8th Cir. 1986); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 819 (10th Cir. 1990); *Currie v. Cayman Res. Corp.*, 835 F.2d 780, 784 (11th Cir. 1988); *Landry v. All Am. Assurance Co.*, 688 F.2d 381, 385 (5th Cir. 1982).

U.S. 1, 24 (1977). And Section 14(e) plainly flunks the rigorous analysis that this Court applies today in deciding whether to infer a private right of action.

The "judicial task" today "is limited solely to determining whether Congress intended to create the private right of action asserted by [the plaintiffs]." *Sandoval*, 532 U.S. at 286; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). "To recognize an implied cause of action," a court must "conclude that Congress *intended* to provide a cause of action even though Congress did not expressly say as much in the text of the statute." *Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1097-98 (D.C. Cir. 2017) (Kavanaugh, J.). That is a "high bar." *Id.* at 1098; *see Thompson*, 484 U.S. at 192 (Scalia, J., concurring in the judgment). The inquiry into whether Congress intended a private cause of action it did not express thus begins with a healthy dose of skepticism and, indeed, a presumption against such an implied right. *See* Scalia & Garner, *supra*, at 313-17.

This Court has set forth a two-part test that a plaintiff must meet in order to pass that bar and demonstrate that Congress intended to create a private right of action it did not actually express: first, the statute must "display[] an intent to create a private right" through the use of "rights-creating language"; and, second, the overall legislative scheme must indicate that Congress wished that private right to be enforceable by "a private remedy." *Sandoval*, 532 U.S. at 286, 288. Respondents cannot make *either* necessary showing as to Section 14(e) here.

1. Section 14(e) lacks "rights-creating" language

"'[T]he question whether Congress . . . intended to create a private right of action [is] *definitively answered in the negative*' where 'a statute by its terms grants no private rights to any identifiable class.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002) (first alteration added) (emphasis added) (citation omitted). "For a statute to create . . . private rights, its text must be 'phrased in terms of the persons benefited.'" *Id.* at 284 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979)). "Statutes that focus on the person *regulated* rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Sandoval*, 532 U.S. at 289 (emphasis added) (citation omitted).

Section 14(e) flunks this test. Instead of focusing on the "benefited class," Congress "framed the statute simply as a general prohibition." *Washington Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d at 1354 (quoting *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 772 (1981)). Section 14(e) by its terms only "proscribes certain conduct," *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979); it thus focuses entirely "on the person regulated," not the person benefited. *Sandoval*, 532 U.S. at 289. Section 14(e) accordingly lacks the "'rights-creating' language so critical to the Court's analysis in" the few cases where it has recognized an implied right. *Id.* at 288. That by itself is sufficient

to conclude that no private right of action may be inferred under Section 14(e).[14]

2. *Section 14(e) reflects no congressional intent to create a private remedy*

"[E]ven where a statute is phrased in . . . explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to . . . also [create] a private *remedy*.'" *Gonzaga*, 536 U.S. at 284; *see also Sandoval*, 532 U.S. at 290. Respondents cannot make that additional showing here. Indeed, the fact that Congress has created other enforcement mechanisms for remedying violations under Section 14(e) is sufficient to establish that Congress did not "intend[] to authorize by implication additional judicial remedies for private citizens." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 487-88 (1996) (citation omitted).

Section 14(e) creates an alternative remedial scheme itself. Its second sentence instructs the SEC to "define, and *prescribe means* reasonably designed to prevent" the conduct made unlawful. 15 U.S.C. § 78n(e) (emphasis added). Section 14(e) is thus "phrased as a directive to federal agencies" to address

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[14] The fact that Section 14(e) ultimately "protect[s] [a] class of shareholder-offerees," *Piper*, 430 U.S. at 38, is not enough. Practically *all* statutes have some class of persons that they benefit, but very few statutes create private rights of enforcement by implication. *See Transamerica*, 444 U.S. at 24 ("[T]he mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf."); *Touche Ross*, 442 U.S. at 578 ("[T]he mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf.").

the proscribed conduct—a context where, this Court has said, there is "far less reason to infer a private remedy in favor of individual persons." *Sandoval*, 532 U.S. at 289 (citations omitted).

Moreover, the securities laws also establish no fewer than "*eight* express liability provisions" governing the circumstances in which Congress intended to authorize private enforcement. *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 296 (1993) (emphasis added); *see supra* at 7-8 (listing examples). Likewise, Congress created express causes of action that allow the SEC to seek to enjoin violations of Section 14(e), impose civil penalties for those violations, and even impose *criminal* sanctions for them. *See* 15 U.S.C. §§ 77t(b), 78u(d)(3)(A), 78ff(a); *see also supra* at 7.

"In view of these express provisions, . . . it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action'" under Section 14(e). *Transamerica*, 444 U.S. at 20 (citation omitted); *see Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (holding that the "presumption that a remedy was deliberately omitted" is "strongest" when Congress has enacted a detailed enforcement scheme). The statutory context for Section 14(e) thus confirms that Congress did not intend a private right of action—in addition to the express enforcement mechanisms it established—to pursue violations of Section 14(e).

C. There Is No Basis To Recognize, Or Acquiesce In, An Inferred Private Right Based On The History Of Section 14(e)

The fact that Section 14(e) was enacted during a time when this Court *was* in the business of inferring

private rights of action does not support a different conclusion. In *Sandoval*, this Court rejected precisely such an argument in refusing to infer a private right of action under Section 602 of Title VI of the Civil Rights Act, explaining that "legal context matters only to the extent it clarifies text." 532 U.S. at 288. In doing so, the Court emphasized that "[n]ot even when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak* have we applied *Borak*'s method for discerning and defining causes of action." *Id.* at 287. To the contrary, this Court has subjected each new assertion of an inferred cause of action under the securities laws to the rigorous standards that the Court's modern decisions establish for creating or extending inferred private rights. *See, e.g.*, *Stoneridge Inv. Partners*, 552 U.S. at 165; *Janus*, 564 U.S. at 141-42; *Sandoval*, 532 U.S. at 288.

There is also no basis to acquiesce in lower courts decisions inferring a private right under Section 14(e). When this Court acquiesced in the lower courts' inference of an implied private right under Section 10(b) and Rule 10b-5 in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971), "[s]uch acquiescence was 'entirely consistent' with [*Borak*]," the governing precedent at the time. *Musick, Peeler & Garrett*, 508 U.S. at 299 (Thomas, J., dissenting). Likewise, the lower court decisions inferring a private right under Section 14(e) took root in a day when *Borak's* permissive approach to inferring private rights still governed. But no court of appeals recognizing an inferred private right under Section 14(e) has ever subjected it to the rigorous analysis demanded by *Sandovol*. *See id.* at 300 ("How a particular private cause of action may have emerged

should not weaken our vigilance in the subsequent interpretation and application of that action.").

Nor does this Court's precedent recognizing an inferred private right of action under Section 10(b) and Rule 10b-5 require this Court to recognize an inferred private right under Section 14(e). Although the rigors of statutory *stare decisis* would stand in the way of subjecting the inferred private right under Section 10(b) and Rule 10b-5 to a fresh look under this Court's modern precedent, no such considerations apply to Section 14(e). Indeed, the only other time the question of an inferred private right for plaintiffs like Respondents here received this Court's attention, this Court pointedly reserved the issue. *See Piper*, 430 U.S. at 42 n.28 ("Whether shareholder-offerees . . . have an implied cause of action under § 14(e) is not before us, and we intimate no view on the matter.").

Now that the issue is back before the Court, the Court should hold that there is no inferred private right of action under Section 14(e)—period.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Section 11 of the Securities Act of 1933

15 U.S.C. § 77k

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having

prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the

Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was

no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

* * *

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall

any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

* * *

Section 12 of the Securities Act of 1933

15 U.S.C. § 77*l*

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2), if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

Section 17(a) of the Securities Act of 1933

15 U.S.C. § 77q

§ 77q. Fraudulent interstate transactions

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * *

Section 20 of the Securities Act of 1933

15 U.S.C. § 77t

§ 77t. Injunctions and prosecution of offenses

(a) Investigation of violations

Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Action for injunction or criminal prosecution in district court

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter. Any such criminal proceeding may be

brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

* * *

(d) Money penalties in civil actions

(1) Authority of Commission

Whenever it shall appear to the Commission that any person has violated any provision of this subchapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 77h-1 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(2) Amount of penalty

(A) First tier

The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

(B) Second tier

Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant

as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(I) the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(II) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

* * *

(e) Authority of court to prohibit persons from serving as officers and directors

In any proceeding under subsection (b), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 77q(a)(1) of this title from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title or that is required to file reports pursuant to section 78*o*(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

* * *

Section 9 of the Securities Exchange Act of 1934

15 U.S.C. § 78i

§ 78i. Manipulation of security prices

(a) Transactions relating to purchase or sale of security

It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security other than a government security, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with 1 or more other persons, a series of transactions in any security

registered on a national securities exchange, any security not so registered, or in connection with any security-based swap or security-based swap agreement with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or a security-based swap agreement with respect to such security, to induce the purchase or sale of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(4) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to make, regarding any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based

swap agreement with respect to such security, for the purpose of inducing the purchase or sale of such security, such security-based swap, or such security-based swap agreement any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which that person knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a broker, dealer, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to induce the purchase of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security other than a government security for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or

appropriate in the public interest or for the protection of investors.

(b) Transactions relating to puts, calls, straddles, options, futures, or security-based swaps

It shall be unlawful for any person to effect, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires—

(A) any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so;

(B) any security futures product on the security; or

(C) any security-based swap involving the security or the issuer of the security;

(2) any transaction in connection with any security with relation to which such person has, directly or indirectly, any interest in any—

(A) such put, call, straddle, option, or privilege;

(B) such security futures product; or

(C) such security-based swap; or

(3) any transaction in any security for the account of any person who such person has reason to believe has, and who actually has, directly or indirectly, any interest in any—

(A) such put, call, straddle, option, or privilege;

(B) such security futures product with relation to such security; or

(C) any security-based swap involving such security or the issuer of such security.

(c) Endorsement or guarantee of puts, calls, straddles, or options

It shall be unlawful for any broker, dealer, or member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

(f) Persons liable; suits at law or in equity

Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover

contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

* * *

Section 10(b) of the Securities Exchange Act of 1934

15 U.S.C. § 78j

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

---

[1] So in original. Probably should be followed by a comma.

Section 14 of the Securities Exchange Act of 1934

15 U.S.C. § 78n

§ 78n. Proxies

(a) Solicitation of proxies in violation of rules and regulations

(1) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

(2) The rules and regulations prescribed by the Commission under paragraph (1) may include—

(A) a requirement that a solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer; and

(B) a requirement that an issuer follow a certain procedure in relation to a solicitation described in subparagraph (A).

* * *

(e) Untrue statement of material fact or omission of fact with respect to tender offer

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

* * *

Section 16(b) of the Securities Exchange Act of 1934

15 U.S.C. § 78p

§ 78p. Directors, officers, and principal stockholders

* * *

(b) Profits from purchase and sale of security within six months

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no

such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement or a security-based swap involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

* * *

Section 18 of the Securities Exchange Act of 1934

15 U.S.C. § 78r

§ 78r. Liability for misleading statements

(a) Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc.

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

* * *

(c) Period of limitations

No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

Section 21 of the Securities Exchange Act of 1934

15 U.S.C. § 78u

§ 78u. Investigation and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem

necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

* * *

(c) Judicial enforcement of investigative power of Commission; refusal to obey subpena; criminal sanctions

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to

imprisonment for a term of not more than one year, or both.

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(2) AUTHORITY OF COURT TO PROHIBIT PERSONS FROM SERVING AS OFFICERS AND DIRECTORS.—In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title or that is required to file reports pursuant to section 78*o*(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(3) MONEY PENALTIES IN CIVIL ACTIONS.—

(A) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(B) AMOUNT OF PENALTY.—

(i) FIRST TIER.—The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross

amount of pecuniary gain to such defendant as a result of the violation.

(ii) SECOND TIER.—Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) THIRD TIER.—Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

* * *

(5) EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

* * *

17 C.F.R. § 240.10b–5

§ 240.10b–5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

No. 18-459

In the Supreme Court of the United States

EMULEX CORPORATION, ET AL., PETITIONERS

v.

GARY VARJABEDIAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), sets out two distinct forms of liability "in connection with any tender offer." Its first clause makes it "unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." Its second clause makes it "unlawful for any person * * * to engage in any fraudulent, deceptive, or manipulative acts or practices."

Consistent with its plain text, this Court has twice construed language indistinguishable from the first clause to require a showing of negligence, not scienter. This Court has also confirmed that where, as here, a statute separates two clauses with the disjunctive (declaring it "unlawful" to violate the first clause "or" the second), each clause retains its own distinct culpability requirement.

The question presented is:

Whether an action premised solely on Section 14(e)'s first clause, not its second, requires pleading scienter to state a claim.

The question *not* presented is:

Whether Section 14(e) creates a private right of action, a splitless question that was not pressed or passed upon below because petitioners conceded the issue (consistent with the uniform holding of every appellate court to have considered the question for the past fifty years).

PARTIES TO THE PROCEEDING BELOW

Petitioners are Emulex Corporation; Bruce C. Edwards; Jeffrey W. Benck; Gregory S. Clark; Gary J. Daichendt; Paul F. Folino; Beatriz V. Infante; John A. Kelley; Rahul N. Merchant; Nersi Nazari; Dean A. Yoost; Avago Technologies Wireless (USA) Manufacturing, Inc.; and Emerald Merger Sub, Inc.

Respondents are Gary Varjabedian and Jerry Mutza. Mr. Varjabedian filed the initial complaint in this case, but the district court ultimately appointed Mr. Mutza as lead plaintiff for the class. See Pet. App. 1a n.1.

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L. Bebchuk, et al., *Fairness Opinions: How Fair Are They and What Can Be Done About It?*, 1989 Duke L.J. 27 (Feb. 1989) 22
H.R. Rep. No. 1711, 90th Cong., 2d Sess. (1968) 20, 37
H.R. Rep. No. 910, 100th Cong., 2d Sess. (1988) 42
Ann Lipton, *The Puzzle of Emulex*, Business Law Prof Blog (Jan. 12, 2019) <tinyurl.com/securities-expert-on-emulex> 37, 38
3 L. Loss, *Securities Regulation* (2d ed. 1961) 10
L. Loss, et al., *Fundamentals of Securities Regulation* (5th ed. 2004) 11
Senate Comm. on Banking and Currency: Hearings Before the Subcomm. on Securities on S. 510, 90th Cong., 1st Sess. (1967) 36

In the Supreme Court of the United States

No. 18-459

EMULEX CORPORATION, ET AL., PETITIONERS

v.

GARY VARJABEDIAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 888 F.3d 399. The order and opinion of the district court (Pet. App. 27a-57a) is reported at 152 F. Supp. 3d 1226.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2018. A petition for rehearing was denied on September 6, 2018 (Pet. App. 58a-59a). The petition for a writ of certiorari was filed on October 11, 2018, and granted on January 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action arises from a merger between Emulex Corporation and Avago Technologies. The companies announced their merger agreement in February 2015, with "Avago offering to pay $8.00 for every share of outstanding Emulex stock." Pet. App. 2a-3a. That price reflected a 26.4% premium over the previous closing price, and a 4.8% premium over Emulex's 52-week high. J.A. 77-78; see also Pet. App. 39a.

Emulex hired Goldman Sachs to perform a fairness analysis on the proposed deal. As part of its work, Goldman Sachs conducted a premium analysis—a study of 17 comparable transactions that Goldman Sachs "deemed most similar to the proposed merger." Pet. App. 4a-5a. That analysis revealed Emulex's premium was decidedly below average: other companies received mean and medium premiums of (i) 44.8% and 50.8% over their undisturbed stock price, and (ii) 17.6% and 14.4% over their 52-week highs. J.A. 255. Those figures represented *multiples* of the premium offered to Emulex's shareholders. Goldman Sachs nonetheless concluded the merger was fair "despite a below-average premium." Pet. App. 5a.

Emulex filed a 48-page Recommendation Statement with the SEC supporting Avago's offer and encouraging shareholders to tender their shares. Pet. App. 3a-4a; J.A. 21. It listed nine reasons for that recommendation, including (repeatedly) that "Emulex shareholders would receive a premium on their stock." Pet. App. 4a. Despite devoting five single-spaced pages to summarizing Goldman Sachs's fairness opinion, Emulex neglected to disclose the premium analysis (or its showing of a below-average premium) at any point in its extended filing. *Id.* at 5a, 30a.

The merger was ultimately consummated, but the approval was close: only 60.58% of outstanding shares were tendered. J.A. 179.

2. In response to these events, a shareholder class filed suit against Emulex, its board, and Avago for violating federal securities laws. Pet. App. 5a-6a. As relevant here, the class sought relief under Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), which was added as part of the Williams Act of 1968, Pub. L. No. 90-439, 92 Stat. 454.

Section 14(e) sets out two distinct types of liability in the tender context. Its first clause prohibits "any untrue statement of a material fact or [a material] omi[ssion]," and its second clause prohibits "any fraudulent, deceptive, or manipulative acts or practices." 15 U.S.C. 78n(e). The class alleged a violation of the first clause: petitioners made material misstatements and omissions by touting the premium while failing to "disclose[]" it "was below average." Pet. App. 5a.

3. The district court dismissed the complaint. Pet. App. 27a-57a. It held that scienter was required to prove a Section 14(e) violation, and it found the class failed to adequately allege scienter. *Id.* at 33a-51a. In the course of its analysis, the court acknowledged respondents' position that scienter was not required, and recognized that scholars and treatises read Section 14(e)'s first clause as imposing only a negligence standard. *Id.* at 35a-36a. While the court admitted respondents' position was "not entirely without merit," it decided the "better view" was to follow "the wealth of persuasive case law to the contrary." *Id.* at 36a.[1]

4. a. The court of appeals reversed. Pet. App. 1a-26a. As relevant here, the court held that claims premised on

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[1] Because the district court dismissed the complaint on culpability grounds, it declined to decide whether respondents had adequately pleaded materiality. See Pet. App. 34a n.3. But it did acknowledge that "[n]o doubt some investors would have found the Premium Analysis interesting and useful." *Id.* at 46a.

Section 14(e)'s first clause "require[] a showing of negligence, not scienter." *Id.* at 2a. Because respondents' claims were premised solely on that first clause, the court found the district court erred by requiring a showing of intentional misconduct. *Id.* at 20a.

The Ninth Circuit started its analysis with the text. Pet. App. 8a. It noted that a "plain reading" of Section 14(e) "divides the section into two clauses, each proscribing different conduct." *Ibid.* It found that the "text of the first clause" is "devoid of any suggestion that scienter is required." *Id.* at 16a. It explained that this Court had construed "largely identical" text to "require[] a showing of negligence, not scienter." *Id.* at 13a (discussing *Aaron* v. *SEC*, 446 U.S. 680 (1980), and *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976)). And the court reinforced its conclusion with Section 14(e)'s "legislative history and purpose"—which "place[] more emphasis on the quality of information shareholders receive in a tender offer than on the [issuer's] state of mind." *Id.* at 15a-16a.

While recognizing that other courts had suggested scienter is required, the Ninth Circuit exhaustively refuted their logic, especially their presumption that the same rules apply to both Rule 10b-5 (which requires scienter) and Section 14(e)'s first clause (which does not). Pet. App. 9a-16a. As the Ninth Circuit explained, those courts overlooked "important distinctions" between the two provisions, and likewise ignored (or preceded) this Court's pertinent authority. *Id.* at 9a, 14a-15a. The court explained, for example, that *Ernst*'s conclusion to require scienter under Rule 10b-5 "had nothing to do with [its] text," but instead resulted from the Rule's "relationship" with "its authorizing legislation, Section 10(b)," which textually *did* require scienter. *Id.* at 11a-12a (further noting that "[t]his rationale regarding Rule 10b-5 does not apply to Section

14(e), which is a statute, not an SEC Rule"). And it explained that other decisions preceded *Aaron*, which construed Section 17(a)(2)'s parallel language to "*not* require a showing of scienter"—thus "cast[ing] doubt" on earlier Section 14(e) decisions from multiple circuits. *Id.* at 12a.

b. Judge Christen concurred in "full[]." Pet. App. 20a. She emphasized that the panel's decision "is a faithful application" of this Court's decisions, unlike other courts that failed to "address[] the ramifications of the Supreme Court's holdings." *Id.* at 20a-26a. Under the Act's plain text, she explained, "[o]nly the second clause of § 14(e) contemplates a scienter requirement; Congress did not use the words signaling a heightened standard of culpability in the first clause of the statute." *Id.* at 24a.

Judge Christen concluded that one "cannot be sure how other circuits would rule were they to revisit § 14(e) in light of *Ernst & Ernst* and *Aaron*." Pet. App. 26a.

5. Petitioners subsequently sought rehearing on Section 14(e)'s culpability requirement. As before the panel, they did not ask the full court to reconsider its authority declaring Section 14(e) privately enforceable, and they did not argue (or even reference) any of this Court's "modern" private-rights-of-action cases. C.A. Emulex Reh'g Pet. 1-18.

The court of appeals denied the petition without recorded dissent. Pet. App. 58a-59a.

SUMMARY OF ARGUMENT

Congress enacted Section 14(e) to create a private right of action premised on negligence, not scienter. The Ninth Circuit's holding below was correct, and the judgment should be affirmed.

I. A. The Ninth Circuit correctly read Section 14(e)'s plain language to mean what it says. Its two clauses are

set up as separate, independent bans on distinct wrongdoing. The first clause—prohibiting material misstatements and omissions—has nothing to do with scienter. Indeed, a scienter requirement does not expressly appear *anywhere* in Section 14(e), and only its second clause even uses words traditionally associated with scienter ("fraudulent, deceptive, and manipulative"). This Court has *twice* construed materially identical text as requiring mere negligence, not scienter. There is no reason to give the same language a different meaning here.

B. Petitioners' theory would undermine Congress's objectives. The entire point of the Williams Act was to ensure shareholders receive full and fair disclosures. A shareholder suffers the same prejudice whether a disclosure was negligent or intentional, and there is no indication Congress intended to give corporate actors a free pass for unreasonably failing to disclosure *material* information. The tender-offer rules impose duties on those same actors to ensure they deliver what Congress has deemed necessary for informed shareholder voting. If a defendant fails to honor its obligations, it has frustrated the statutory objective.

Petitioners also predict a rash of reckless securities litigation, but their concerns are unfounded. Securities claims are difficult to prove. There are few cases that can satisfy every other heightened element, but would still lose on scienter alone. And if there are any legitimate concerns about abusive litigation, the answer is to *target the abuse*, not to artificially distort the natural elements of Section 14(e). Congress has fashioned a series of adequate remedies calibrated specifically for the securities context; courts can employ those remedies without grafting an atextual scienter requirement onto every private right of action.

C. Petitioners are mistaken that courts are required to construe every private right of action to assume the smallest possible footprint. The analysis in this context, like the analysis of any other statutory provision, is tethered directly to Congress's intent. There is no rule of law or logic permitting courts to abandon all the usual tools of statutory construction in the implied-right-of-action context. And employing those tools here, it is clear that Section 14(e) is satisfied without a showing of scienter.

II. A. In this Court, but not below, petitioners now argue that Section 14(e) does not create a private right of action. That question was not pressed or passed upon below; on the contrary, petitioners expressly *conceded* that Section 14(e) *does* support a private right of action. The fact that petitioners broadly framed their question presented does not automatically revive an argument petitioners indisputably waived before the Ninth Circuit.

Nor is the case suitably presented for review. The appellate courts are unanimous in finding that Section 14(e) provides a right of action; the arguments in the parties' briefs have not been carefully vetted by any court below, and it makes little sense for this Court to be the very first to grapple with these (occasionally) thorny issues.

And there is a compelling practical benefit to further percolation. The Section 14(e) right of action has been a fixture in the lower courts for half a century. Congress has had every opportunity to repudiate the uniform consensus that a private right exists, but it has instead said nothing—aside from effectively ratifying the unbroken line of decisions. There is a serious danger that jumping on the issue at this late hour will upset, not uphold, Congress's intent, and interfere with the considered judgment of the political branches. A short pause would put Congress on notice that the issue ought to be on its radar.

B. In any event, petitioners' private-right challenge is insubstantial on the merits. At its irreducible core, this issue turns on legislative intent, and there is no doubt that Congress understood it was activating a private right of action.

1. Congress, first and foremost, "modeled" Section 14(e) after the specific language of Rule 10b-5, which was widely known to create private rights. When Congress invoked the same textual formulation, it quite clearly intended the same result.

2. Congress's express purpose in the Williams Act was to impose the same regulatory scheme for proxy solicitations (under Section 14(a)) and tender offers (under the new Section 14(e)). Four years before Congress acted, this Court declared that Section 14(a) created a private right of action. This Court's decision was called to Congress's attention during the legislative process, and there is no reason to think Congress tried to "harmonize" these two schemes by inserting a sharp break between their central means of enforcement. Neither petitioners nor the government could explain why Congress would conceivably wish to let private parties seek relief for false statements in a proxy solicitation but not in a tender offer. There is no reason to inject a puzzling anomaly into the statutory scheme.

3. For the past 50 years, every single circuit to have confronted the question has determined that Section 14(e) is privately enforceable. Indeed, this Court itself has adjudicated a private claim under Section 14(e), without so much as a hint that the private action did not exist.

Congress has now acted against this clear consensus for half a century, and it has repeatedly revised the securities laws, including in areas that directly touch the tender context. It is inconceivable that Congress disagreed with this overwhelming judicial authority but simply said

nothing about it. If the Court nonetheless thinks this issue has any possible merit, it should at least await a vehicle where the petitioners did not outright waive the question below.

The Ninth Circuit faithfully read Section 14(e)'s plain text consistent with this Court's unmistakable guidance, and its decision alone is consistent with the statutory scheme. The judgment should be affirmed.

ARGUMENT

I. THE FIRST CLAUSE OF SECTION 14(e) REQUIRES A SHOWING OF NEGLIGENCE, NOT SCIENTER, TO STATE A CLAIM

A. The Section's Plain Text And Context Establish That Scienter Is Not Required

1. Statutory interpretation starts with the text (*e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017)), and the text here is unambiguous. Section 14(e) is plainly divided into two clauses, each targeting a different category of prohibited conduct:

> It shall be unlawful for any person [1] to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or [2] to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer * * * .

15 U.S.C. 77n(e) (brackets added).

The first clause has no hint of scienter. It does not expressly require scienter (or *any* specific state of mind). It does not use any of the usual terms associated with scienter (*Aaron*, 446 U.S. at 695-696), even though the *second* clause does (*Ernst*, 425 U.S. at 199). Its terms are satisfied whenever a covered defendant makes a material misstatement or omission, irrespective of the actor's intent. And it

does so in the context of a statute mandating *disclosure* so shareholders can make informed decisions. *Schreiber* v. *Burlington N., Inc.*, 472 U.S. 1, 8-10 (1985). A *negligent* misstatement or omission is still a misstatement or omission, and it still deprives shareholders of necessary information. If Congress wanted to restrict Section 14(e)'s reach to intentional wrongdoing, it assuredly knew how to do it.[2]

2. This Court has already twice construed indistinguishable language as requiring negligence, not scienter.

First, the Court in *Aaron* so held for Section 17(a)(2), which prohibits "obtain[ing] money or property by means of any untrue statement of a material fact or any [material] omission." 15 U.S.C. 77q(a)(2); compare 15 U.S.C. 78n(e) (using indistinguishable terms). As *Aaron* explained, that language is "devoid of any suggestion whatsoever of a scienter requirement." 446 U.S. at 696. It quoted a "well-known commentator" as noting "'[t]here is nothing on the face of [Section 17(a)(2)] itself which smacks of *scienter* or intent to defraud." *Ibid.* (quoting 3 L. Loss, *Securities Regulation* 1442 (2d ed. 1961)).[3] While

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[2] This reading is further reinforced by Congress's categorical language. The section on its face targets "*any* untrue statement"; the word "any" necessarily covers the entire universe of "untrue statements," which includes the subcategory of *negligent* untrue statements. If Congress wished to exclude certain misstatements from Section 14(e)'s reach, it would have chosen a different modifier for the operative text. Nor can petitioners tease out a "scienter" element by redefining the common meaning of Congress's words. In this context, no one reads "untrue" to mean "dishonest" or "misleading" to mean "deceptive" (Pet. Br. 28)—which itself would render Section 14(e)'s second clause superfluous.

[3] That same "well-known commentator" examined Section 14(e)'s text and concluded its first clause likewise requires negligence, not scienter. L. Loss, et al., *Fundamentals of Securities Regulation* 652

other parts of Section 17(a) might require scienter, this Court found that Section 17(a)(2)'s language "compel[s] the conclusion" that "scienter" is not "required." *Id.* at 697.

Petitioners have no real answer for the obvious parallel between Sections 14(e) and 17(a)(2). *Aaron* read materially indistinguishable language to "mean what it so plainly seems to say"—that scienter was *not* required. 446 U.S. at 697. There is simply no basis for assigning the same words a different meaning here.

In response, petitioners argue *Aaron* is distinguishable because (i) Section 17(a) is not privately enforceable, and (ii) *Aaron* involved claims for injunctive relief. Br. 36-39. Both points are wrong. As for the first: the relevant question is not *who* enforces these sections, but *what these sections mean*; the "identity of the plaintiff" is irrelevant. *Aaron*, 446 U.S. at 691 (so holding). As for the second: the right inquiry is not what relief is available once culpability is established, but *the standard for establishing culpability*. *Ibid.* (rejecting the proposition that the standard turns on "the identity of the plaintiff or *the nature of the relief sought*") (emphasis added). *Aaron* examined the plain text and determined intent was not required to prove a violation. The language in each section (Sections 14(e) and 17(a)(2)) is indistinguishable, and *Aaron* construed that language on its face to require only negligence, not scienter.

Second, this Court in *Ernst* read the same language the same way, finding that Rule 10b-5(b)'s parallel text

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(5th ed. 2004) ("The Supreme Court's construction of § 17(a) should govern so as to conclude that scienter (whatever its meaning) is required by the 'fraudulent' and 'deceptive' clause of § 14(e), which more or less tracks § 17(a)(1) of the 1933 Act, and § 10(b) of the 1934 Act, but not the untrue statement clause, which *precisely* tracks § 17(a)(2).") (reproduced at C.A. E.R. 190).

"could encompass both intentional and negligent behavior." 425 U.S. at 212-213. As the Court explained, Rule 10b-5(b)'s language, "[v]iewed in isolation," proscribes "any type of material misstatement or omission," "whether the wrongdoing was intentional or not." *Ibid.*; accord *Aaron*, 446 U.S. at 696 (reaffirming this point). While *Ernst* ultimately adopted a different reading, it did so for *independent* reasons, none of which apply here. See *Ernst*, 425 U.S. at 212-213 (explaining that, under its natural reading, Rule 10b-5 would "exceed" the SEC's rulemaking authority, given Section 10(b)'s narrow focus on "intentional wrongdoing").

In response, petitioners argue that, whatever its reasoning, *Ernst* still "held" that scienter was required, and Section 14(e) tracks Section 10(b) and Rule 10b-5. Pet. 29-30. This is perplexing. *Ernst*'s disposition turned on the limited scope of Section 10(b), not the broader language in Rule 10b-5. See *Aaron*, 446 U.S. at 690 (so noting). As *Ernst* explained, Section 10(b), unlike Section 14(e), focused *exclusively* on concepts invoking scienter ("manipulation," "deception," etc.). 425 U.S. at 197-199. Because Section 10(b) required scienter, Rule 10b-5 also had to require scienter; otherwise, the SEC's rule would "exceed" the scope of its rulemaking authority. *Id.* at 212-213.[4]

Those points have nothing to do with Section 14(e). Its two clauses are each found in a *statute*, not a regulation. There is no concern of the SEC exceeding its authority,

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[4] Contrary to petitioners' contention, *Ernst*'s emphasis was not its brief reference to "'procedural restrictions'" (Pet. 32); the Court was clear that Section 10(b)'s language drove the analysis. *Ernst*, 425 U.S. at 200-201 (focusing "primarily on the language of that section"); see also *Aaron*, 446 U.S. at 690 (*Ernst*'s "most important" consideration "was the plain meaning of the language of § 10(b)"). Petitioners are wrong to minimize the Court's paramount focus on the language itself.

because the question is what *Congress* itself wrote into the statute. And while Section 14(e)'s second clause mirrors Section 10(b)'s language, its first clause has no counterpart in Section 10(b). That first clause sweeps beyond Section 10(b)'s narrow focus, and its terms are "devoid of any suggestion whatsoever of a scienter requirement." *Aaron*, 446 U.S. at 696. For exactly those reasons, this Court readily concluded that Section 17(a)(2) required negligence, not scienter, despite its parallels to Section 10(b) and Rule 10b-5. The same logic inescapably applies here. See also, *e.g.*, *Pryor* v. *U.S. Steel Corp.*, 591 F. Supp. 942, 955 n.19 (S.D.N.Y. 1984).

3. Petitioners' further efforts to avoid the plain text fall short.[5]

a. Petitioners insist that Section 14(e)'s separate clauses must be read together to impose a unitary scienter requirement. Pet. Br. 26-27. But this Court already rejected that proposition in *Aaron*, holding that no "uniform" treatment was required. 446 U.S. at 697. It explained that provisions like this are properly read as targeting separate categories, each with their own independent requirements. *Ibid.* ("each subparagraph of § 17(a) 'proscribes a distinct category of misconduct'"). This is confirmed by "the use of an infinitive to introduce each of

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[5] As one of their lead arguments, petitioners focus on explaining why they believe Section 14(e) does *not* require negligence, as opposed to explaining why it *does* require scienter. Br. 24-25. Aside from confirming petitioners' lack of confidence in their ability to establish scienter, this point wholly misses the mark. In its past cases (in *Ernst* and *Aaron*), this Court has always treated the decision as a choice between scienter and negligence, and the government has explained why that is likely so. See U.S. Br. 24-26. In this case, it was uncontested below that the standard was at least negligence, so that is all respondents are defending here. And while there is a textual basis for strict liability, the pertinent point is there most certainly is *not* a textual basis for scienter.

[the] subsections, and the use of the conjunction 'or' at the end of the first two." *United States* v. *Naftalin*, 441 U.S. 768, 774 (1979). Had Congress wanted identical coverage under each clause, it would have used the same wording in each section. *Id.* at 773-774. Instead, Congress outlined "distinct categor[ies] of misconduct" because "[e]ach succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." *Id.* at 774; accord *Aaron*, 446 U.S. at 697.

That reasoning controls here. As with Section 17(a), Section 14(e)'s clauses are phrased in the disjunctive, and each clause is "introduce[d]" with "an infinitive." *Naftalin*, 441 U.S. at 774. Congress enumerated two prohibitions to establish liability if one "*or*" the other is met; it did not separate out independent commands (each with its own infinitive) only to collapse the two together. See, *e.g.*, *McFarland* v. *Wells Fargo Bank, N.A.*, 810 F.3d 273, 285 (4th Cir. 2016); *United States* v. *Sheldon*, 755 F.3d 1047, 1050 (9th Cir. 2014); *Stevens* v. *Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 452 (6th Cir. 1992).

Moreover, petitioners' reading invites an obvious surplusage problem: if each clause requires scienter, then these two separate provisions, drafted in conspicuously different terms, would cover the same conduct. An *intentional* "untrue statement" surely qualifies as a "fraudulent, deceptive, or manipulative act[] or practice[]" (15 U.S.C. 78n(e)), leaving nothing for Section 14(e)'s first clause to do. These clauses use different language to invoke different prohibitions, and the Ninth Circuit's construction gives independent meaning to "'each distinct category of misconduct.'" *Aaron*, 446 U.S. at 697. Petitioners' theory, by contrast, reads the first clause straight out of the statute. See *Lane* v. *United States*, 286 F.3d 723,

730-731 (4th Cir. 2002). That is not what any ordinary application of the so-called "whole-text canon" (Pet. Br. 27) is designed to do.

Finally, while petitioners are assuredly correct that Section 17(a) is broken into formal "subparagraphs" and Section 14(e) is not (Br. 37), this Court looked primarily at "the words themselves," not "the use of separate numbers to introduce each subsection." *Naftalin*, 441 U.S. at 774 n.5. The section's "'punctuation'" was addressed only in a single footnote as mere "confirmation" for the language appearing "'on the face of the statute.'" *Ibid.* At bottom, the operative language did the work. And while petitioners emphasize that Section 14(e) is a "single sentence" (Br. 37), they overlook that *the same is true* for Section 17(a): it may have multiple "subparagraphs," but it only has a single period.

b. Nor does noscitur a sociis require a different outcome. Pet. Br. 27-28. That canon cannot override each clause's unambiguous language, and petitioners cannot explain why the second clause (with its distinct prohibition) should artificially limit the first clause's natural scope. *In re Continental Airlines, Inc.*, 932 F.2d 282, 288 (3d Cir. 1991). Petitioners might have a point if Congress had prohibited [1] "mak[ing] any untrue statement" or [2] "engag[ing] in any *other* fraudulent, deceptive, or manipulative" act. But "Congress did not write the statute that way." *Naftalin*, 441 U.S. at 773. Congress isolated the terms invoking scienter to a distinct clause, and clearly delineated the section's *two* prohibitions by phrasing them in the disjunctive, introducing each with the infinitive "to." "When Congress has separated terms with the conjunction 'or,' it is presumed that Congress intended to

give the terms 'their separate, normal meanings.'" *Ibid.* (quoting *Garcia* v. *United States*, 469 U.S. 70, 73 (1984)).[6]

In sum, just as there was no reason in *Aaron* to distort Section 17(a)(2)'s natural meaning due to its "neighbor[ing]" clauses (Pet. 17), there is no reason to distort Section 14(e)'s first clause here. Petitioners have no legal or logical basis for reading this distinct language to impose a uniform culpability requirement. See, *e.g.*, *Aaron*, 446 U.S. at 697 (rejecting an analogous proposition).

c. Petitioners also focus on Section 14(e)'s limited rulemaking delegation to the SEC (Br. 28-29 n.7), but this only proves *respondents'* point. That delegation authorizes the SEC to regulate actions falling within Section 14(e)'s *second* clause, but not its first. 15 U.S.C. 78n(e) (limiting the SEC's focus to "acts and practices" that "are fraudulent, deceptive, or manipulative"). If Congress felt both clauses covered the same ground, it would have authorized rulemaking under the entire subsection. The limited delegation reaffirms that Congress saw an obvious difference between the two provisions, each warranting its own separate treatment.

Petitioners ask why Congress would authorize the SEC to combat only "[]fraud" if Section 14(e)'s first clause covers negligence. The answer is obvious: The second clause requires more guidance. The first clause covers misstatements and omissions, which are known quantities

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[6] A better use of noscitur a sociis here is construing the three words in the *second* clause by "the company [they] keep[]" (*Yates* v. *United States*, 135 S. Ct. 1074, 1085 (2015))—which is why it makes sense to require scienter for "manipulative" or "deceptive" acts. But it makes no more sense to impose a scienter requirement for the first clause than it would to *eliminate* one for the second—even though the first clause is naturally read to capture only *negligence* and in fact *precedes* the second part of the sentence.

with established meanings. They require little elaboration.[7] That is not true of the second category, which covers *any* unspecified "act[]" or "practice[]" that is "fraudulent, deceptive, or manipulative." That undefined conduct begs for rules clarifying stakeholders' rights and obligations. Congress's targeted delegation says nothing about the standards to prove a violation under the first clause.

d. Petitioners argue that the outcome in *Ernst* turned not on the text, but Section 10(b)'s absence of "'significant procedural restrictions'"—and Congress would not authorize an action for "mere negligence" without imposing the same safeguards found in its "express causes of action[]." Pet. Br. 31-34 (citing *Ernst*, 425 U.S. at 208-209). Petitioners have misread *Ernst*: the Court's concern was not the absence of procedural restrictions *per se*, but the reality that extending the "remedy under § 10(b)" would "nullify" the *express* actions under other sections (by covering the same ground). *Ernst*, 425 U.S. at 209 (discussing Section 10(b)'s substantive overlap with "causes of action covered by §§ 11, 12(2), and 15"). There is no such concern with Section 14(e)'s targeted prohibitions in the tender context.[8]

In any event, petitioners' argument fails on multiple other fronts. Their same concerns, for example, undoubtedly would apply to recognizing a cause of action for negligence under Section 14(a), which courts have uniformly construed as requiring negligence, not scienter. See Part I.A.4, *infra*. Yet that private action has been recognized for over 50 years without any repudiation by Congress.

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[7] Anyhow, the SEC had *preexisting* authority under Section 14(d) to regulate mandatory disclosures for tender offers, including any misstatements or omissions. 15 U.S.C. 78n(d)(4).

[8] Besides, the culpability standard is a *substantive* element; scienter is not a "procedural" restriction. Contra Pet. 18.

And petitioners ignore that their concerns have largely been addressed in the PSLRA. To the extent petitioners worry about discovery and fees, Section 78u-4 accounts for both: it imposes mandatory stays pending the disposition of a motion to dismiss, and it requires mandatory sanctions (including the award of attorney's fees) for baseless filings. 15 U.S.C. 78u-4(b)(3), (c). Congress imposed those requirements on "any private action arising under this chapter," and thus chose to mitigate the potential effects of implied actions rather than repeal them entirely (or distort their natural elements).

As a final retort, petitioners argue that private actions under Section 14(e) would "circumvent" the "express cause of action in Section 18." Br. 3-4, 34-36. Petitioners are confused. Section 14(e) targets *any* statement (filed or otherwise) in a tender contest. It does not displace Section 18(a), which has a different focus: statements (of any kind) "filed" with the SEC. 15 U.S.C. 78r(a). The fact that there is some overlap between the two is unexceptional; overlap is found throughout the securities laws, as this Court has repeatedly recognized. See, *e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 383 (1983). Congress understood that heightened protection was necessary in this specific area, which is why it enacted protections for this specific context. If Congress wanted all plaintiffs to usher their claims through Section 18, it would not have added Section 14(e) to the mix.[9]

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[9] Additionally, this Court has noted that Congress "may well" have intended Section 14(e) to dispense with the purchaser/seller requirement found in both Section 10(b) and Section 18(a). See *Piper*, 430 U.S. at 38-39; see also *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 424 (1st Cir. 1973). Indeed, forcing shareholders to invoke Section 18(a) or Section 10(b) to bring claims in the tender-offer context—and thereby satisfy the purchaser/seller requirement—would

In short, contrary to petitioners' contention, *Ernst*'s single paragraph on this point does not stand for the sweeping proposition that negligence standards are always verboten in implied rights of action.

4. Finally, a scienter requirement is incompatible with Section 14's broader statutory context. Congress enacted Section 14(e) to impose the same rules in the tender context that Section 14(a) already imposed in the proxy context. See, *e.g.*, *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 430 (6th Cir. 1980) (Congress intended uniform "standards of liability" for Sections 14(a) and 14(e)). And courts have overwhelmingly recognized that negligence is sufficient to state a claim under Section 14(a). *DeKalb Cty. Pension Fund* v. *Transocean Ltd.*, 817 F.3d 393, 409 & n.95 (2d Cir. 2016).

Proxy solicitations and tender offers represent different ways to accomplish effectively the same thing. That is why Congress deliberately acted to "remedy [a] gap" in the securities laws by subjecting the two schemes to the same form of regulation. *Piper*, 430 U.S. at 22. There is no obvious reason for adopting a different liability standard under Section 14(e); petitioners' contrary position would introduce a puzzling discontinuity in the regulatory scheme. See U.S. Br. 22-24.

B. The Section's Purpose And History Confirm That Scienter Is Not Required

1. Petitioners' theory would also undermine Congress's objectives. Congress enacted Section 14(e) to pro-

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essentially foreclose shareholders from seeking equitable relief, which would be entirely at odds with the purpose of the Williams Act: to ensure shareholders have access to material information *before* deciding whether to keep or tender their shares. See *Piper*, 430 U.S. at 22-24, 42.

tect shareholders, and its chief instrument was "disclosure." *Schreiber*, 472 U.S. at 11-12. The Act thus affirmed the offeror's obligation "to make full disclosure of material information" (H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968)), arming shareholders with the facts necessary to make intelligent decisions. *United States* v. *O'Hagan*, 521 U.S. 642, 667-668 (1997); *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 30-31 (1977).

That purpose is frustrated when corporate actors fail to furnish material information, whether the error is intentional or not. A negligence standard thus "serve[s] to reinforce the high duty of care owed by a controlling corporation" to its shareholders (*Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1300 (2d Cir. 1973)), especially when making critical decisions. Congress expected corporate statements to be correct—which is why it declared it "unlawful" to "make *any* untrue statement" or "omi[ssion]." 15 U.S.C. 78n(e) (emphasis added). Requiring scienter would give careless violators a free pass despite making "untrue statements" falling within the heartland of Section 14(e); that result would needlessly undercut Congress's disclosure mandate.

Section 14(e)'s context also differs from other areas where scienter makes more sense. Rule 10b-5 cases, for example, often target speakers under no "obligation" to say anything. *Gerstle*, 478 F.2d at 1300. An innocent mistake on a non-mandatory topic requires heightened protection, which preserves the incentive for speakers to voluntarily disclose information. *Ibid.*; see also, *e.g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 866-867 (2d Cir. 1968) (Friendly, J., concurring) ("If the only choices open to a corporation are either to remain silent and let false rumors do their work, or to make a communication, *not legally required*, at the risk that a slip of the pen or failure properly to amass or weigh the facts * * * will lead to

large judgments," "most corporations would opt for the former") (emphasis added).

Those concerns have little place in the context of compulsory disclosures. Sections 14(a) and 14(e) govern compulsory statements required by law before corporate mergers can be submitted for shareholder approval. In that different context, speakers are required to provide necessary information so shareholders can make informed decisions. While the decision to voluntarily speak on other topics is sensibly left to a higher bar, Section 14(e)'s plain text reflects Congress's intent to subject these disclosures to more stringent review.[10]

2. Petitioners also suggest that authorizing a negligence standard will encourage litigation abuse. This concern is unfounded. Congress's aims are not frustrated by ensuring that mandatory disclosures are in fact *disclosed*. And it will be the exceptionally rare case where a negligence standard is the deciding factor between filing a claim or letting a material misstatement off the hook. Moreover, courts have been enforcing private actions under Section 14(a) for decades, and petitioners have failed

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[10] Petitioners invoke Judge Friendly's observation of the "frightening" consequences of adopting a negligence standard under Section 10(b) and Rule 10b-5, and suggest the same concerns arise in these "analogous circumstances." See Pet. Br. 34 (quoting *Texas Gulf*, 401 F.2d at 866-867 (Friendly, J., concurring)). This point has already been refuted by—Judge Friendly himself: While "[i]mposition of too liberal a standard with respect to culpability" would deter "statements issued by corporations[] without legal obligation to do so," "*[s]uch considerations do not apply*" to "proxy statement[s] *required by the Proxy Rules*." On the contrary, "a broad standard of culpability here will serve to reinforce the high duty of care owed by a controlling corporation to minority shareholders in the preparation of a proxy statement seeking their acquiescence in this sort of transaction * * *." *Gerstle*, 478 F.2d at 1300 (Friendly, J.) (emphasis added) (drawing an explicit contrast to Rule 10b-5 and *Texas Gulf*).

to explain how a negligence standard in that parallel context has produced any concrete harm. If some shareholders are filing abusive suits, the courts should calibrate the solution to the problem—and punish those shareholders for filing abusive suits. They should not adopt the non-linear solution of requiring scienter (or any other random element) to deter meritless filings.

a. A negligence standard properly holds corporate actors responsible for failing to deliver the facts essential for informed shareholder decision-making. Petitioners may nevertheless insist the sky is about to fall, but this grave prediction is overblown. The elements of securities claims (especially materiality) are notoriously difficult to prove. Plaintiffs must cross multiple thresholds to survive a motion to dismiss, including the PSLRA's other heightened-pleading requirements. 15 U.S.C. 78u-4(b)(1)(A)-(B). That Section 14(e)'s first clause does not require scienter does not mean weak claims get a free pass.[11]

b. Petitioners also ignore the profound benefits produced by legitimate shareholder lawsuits. Congress demanded that companies disclose material facts in the tender context. Yet the desire to consummate a merger can encourage selective disclosure, and there are documented incentives for investment banks to whitewash fairness opinions. L. Bebchuk, et al., *Fairness Opinions: How Fair Are They and What Can Be Done About It?*, 1989 Duke L.J. 27, 30 (Feb. 1989). The SEC lacks the resources to monitor each recommendation statement in real-time.

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[11] Petitioners argue the Ninth Circuit's decision is at odds with the PSLRA's objectives. But Congress could have required scienter across the board; it instead recognized that not every securities claim warrants scienter, and required a "strong inference" only for those that do. 15 U.S.C. 78u-4(b)(2)(A). Petitioners cannot substitute Congress's scalpel with a sledgehammer.

E.g., *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964). Section 14(e), by design, keeps the process honest. See, *e.g.*, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (recognizing the role of "meritorious private actions" in enforcing securities laws and supplementing USDOJ and SEC efforts).

This very case illustrates the point. Here, Emulex refused to provide relevant information (Goldman Sachs's premium analysis) on a marginal tender offer. The proposal was an obvious close call, with barely 60% of outstanding shares ultimately tendered. J.A. 179. Reasonable investors would surely be interested to know that Goldman Sachs identified comparable transactions and found that this offer fell in the bottom end. J.A. 77-78, 255 (44.8% (mean) and 50.8% (median) versus 26.4% (Emulex)); see *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 30-31 (2011).

While this does not automatically establish the transaction was unfair, Section 14's entire point is letting the market decide fairness for itself. *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448 (1976). Petitioners deprived shareholders of key information that Goldman Sachs found sufficiently important to include in its own analysis. (Goldman Sachs does not often waste a board's time with irrelevant material.) That information cut against the offer's fairness, and shareholders were entitled to the information under Section 14(e). It is unclear why a scienter standard should excuse petitioners' mistake.

c. Petitioners also overlook the available solutions that already exist to police meritless claims—and that are actually tailored to deal with the abuse, not to artificially rachet up certain elements even for *meritorious* claims.

Among others: Federal courts could refuse to award fees absent *material* disclosures, thus ensuring the litigation accomplishes Congress's objectives—and deterring filings that are unlikely to produce worthwhile disclosures. See, *e.g.*, *In re Walgreen Co. Shareholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016). They can disqualify class counsel for pursuing fee-driven litigation. *Id.* at 726. They can award sanctions for baseless filings under Fed. R. Civ. P. 11. They can engage in the PSLRA's mandatory-sanctions process after the final adjudication of a frivolous claim. 15 U.S.C. 78u-4(c). And they can enforce the PSLRA's heightened-pleading standards, which are designed to knock out weak claims—indeed, on the same motion that petitioners would like to use to argue scienter. See 15 U.S.C. 78u-4(b).

The fact is that petitioners have all the tools available for escaping and avoiding meritless claims; imposing an atextual scienter requirement would simply excuse liability for a careless corporate actor who failed to make a material disclosure—and thus, by definition, prejudiced investors from making the informed decision that is their right under Section 14(e). Nothing about that position promotes Congress's objectives.[12]

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[12] SIFMA's amicus brief is effectively a broadside against private securities litigation generally. See, *e.g.*, SIFMA Br. 11-28. Some organizations may not like the securities laws, but the question here is how best to read the text, purpose, and history of Section 14(e) to determine its proper elements; the answer is not to abandon all traditional tools of statutory interpretation to adopt whatever construction happens to minimize securities claims. And if SIFMA believes the securities laws are too prone to abuse, its proper audience is Congress, not the courts. The political branches have proven perfectly capable of adopting new rules to police abusive securities practices. If policymakers believe the tender context is ripe for new regulation, Congress is well-equipped to solve the problem.

C. Petitioners Are Incorrect That Courts Are Required To Construe All Private Rights Of Action In Favor Of Avoiding Liability

As a last-ditch effort, petitioners maintain that all private rights of action must be construed narrowly. Br. 21-22. Contrary to petitioners' contention, implied rights of action do not always and automatically assume the smallest possible footprint to minimize liability. The question turns on congressional intent, including the proper reading of the provision's text, context, structure, and purpose. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 175 (1994); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1104-1105 (1991).

Here, there is no genuine doubt about the meaning of Section 14(e)'s first clause. Its text has no scienter requirement, and this Court has rejected (repeatedly) the argument that indistinguishable language requires scienter. The only text that is even possibly consistent with scienter is found in Section 14(e)'s *second* clause, which is textually and analytically distinct from its first. And the statutory objective is advanced by capturing "any" wrongful disclosures (negligent or otherwise), just as the language says.

This may be an implied right of action, but it was one contemplated by Congress, and Congress likewise would have expected courts to employ the usual tools of construction to determine its scope. Petitioners' contrary contention is wrong, and the judge accordingly should be affirmed.

II. PETITIONERS' CHALLENGE TO SECTION 14(e)'S PRIVATE RIGHT OF ACTION IS BOTH MERITLESS AND NOT PROPERLY BEFORE THE COURT

A. Petitioners Waived The Challenge By Expressly Conceding The Issue Below

1. Having lost on the culpability issue below, petitioners now argue that Section 14(e) is not privately enforceable. This is meritless. First and foremost, the Court generally refuses to consider "'questions not raised or resolved in the lower court[s].'" *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (alteration in original). "Although in some instances [the Court] ha[s] allowed a respondent to *defend* a judgment on grounds other than those pressed or passed upon below, it is quite a different matter to allow a petition to assert new substantive arguments *attacking*, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing or at least passed upon by it." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (emphases added) (citation omitted).

Petitioners are attempting to do just that. Petitioners' new argument was not resolved below because it was not *raised* below. On the contrary, petitioners expressly conceded the point: "defendants do not dispute that *Section 14(e)* provides for a private right of action." Emulex C.A. Br. 47; see also Avago C.A. Br. 4 ("join[ing] and incorporat[ing] by reference" Emulex's brief). Petitioners accordingly did not even attempt to preserve the issue below (not even in a footnote), but explicitly conceded the question. Petitioners are bound by that waiver, and it is too late now to revisit their tactical decision. See, *e.g.*, *Chaidez* v. *United States*, 568 U.S. 342, 357 n.16 (2010) (while considering a *Teague* retroactivity analysis, refusing to consider petitioner's "back-up arguments" that *Teague* did

not even apply, because they were made for the first time in the petitioner's opening brief).

In response, petitioners now say they argued the point on rehearing. See Br. 43 n.12 (citing Emulex C.A. Reh'g Pet. 14). Not exactly. The cited page has a single oblique reference tossed in at the end of a paragraph devoted to an entirely different point—the idea that an implied damages remedy cannot be based on negligent conduct. There was no express statement that Section 14(e) was not privately enforceable, much less any argument that existing circuit precedent had been undermined by subsequent authority. If petitioners tried to assert this argument below, it would be deemed waived. See, *e.g.*, *United States* v. *Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). There is no reason this Court should be more lenient.

2. For its part, the government agrees that petitioners did not preserve the issue below. See U.S. Br. 27 ("In the courts below, petitioners did not dispute that Section 14(e) can be enforced through private suits."). But the government excuses their failing because the new argument is "fairly included" within the question presented. *Ibid.* (quoting Sup. Ct. R. 14.1(a)). This misses the point. Nothing in this Court's Rule says that the phrasing of a question presented can *revive* an abandoned or conceded point—a narrow question simply creates an opportunity to *abandon* a point that was actually preserved below. It would be an unusual rule that lets litigants shift gears unilaterally by casting a wider net with the question presented.

3. As a matter of power or prudence, this issue is inappropriate for review. There is no circuit conflict; not a single court below grappled with any of the relevant arguments; indeed, it appears that not a single court *anywhere*

has assessed the full panoply of arguments. And percolation would have an added benefit here, since it would put Congress on notice; if this Court guesses wrong and uproots the uniform practice below, it will have upset a securities scheme that has ably protected shareholder rights for decades. A short delay will give the political branches time to weigh in—should they see any need to revise the overwhelming consensus on this issue.

In the end, this Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). If the Court wants to rethink half a century of settled practice, it should at least wait for a vehicle where the question presented was not expressly abandoned below. See, *e.g.*, *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (refusing to consider "questions neither raised nor resolved below"); *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992) ("[p]rudence" dictates "awaiting * * * the benefit of * * * lower court opinions squarely addressing the question"); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (absent "exceptional" circumstances, this Court does not grant review on "questions not pressed or passed upon below").[13]

B. Section 14(e) Creates A Private Right Of Action

If the Court does choose to reach this question, it has been clear for 50 years that Congress authorized private litigants to sue for Section 14(e) violations.

This question ultimately turns on "congressional intent" (*Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979)), and Congress's intent here is unmistakable. Congress enacted Section 14(e) to "harmonize" the regulation

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[13] Indeed, if petitioners and their amici genuinely believe this is a serious question, it is ample reason for dismissing the petition as improvidently granted. There is no reason for the Court to consume its limited bandwidth deciding the proper elements of a right of action that petitioners (wrongly) believe does not exist.

of proxy solicitations and tender offers. In doing so, Congress chose the verbatim textual formulation for Section 14(e) that courts had already declared privately enforceable for Rule 10b-5; there is no reason to presume that Congress expected those same words to carry a different meaning in this related setting. Indeed, on the contrary, Congress acted on the heels of this Court's decision in *Borak*, which declared Section 14(a) privately enforceable. Congress would not fill the "gap" between Section 14(a) and Section 14(e) by creating an artificial disparity between their primary means of enforcement. This is perhaps why the overwhelming judicial consensus for the past half-century has authorized private lawsuits for Section 14(e) violations—and Congress has not only refused to repudiate the practice, but it has effectively endorsed it.

Although petitioners and the government frame the issue as recognizing a "new" cause of action, there is nothing new about it. Congress has been aware of this robust judicial authority for five decades, and there is no obvious basis for the judiciary to supplant the judgment of the political branches on this important question. The unique factors at issue qualify for a rare private right of action under this Court's settled jurisprudence. If petitioners are dissatisfied with that result, it is safe to say the ball is now squarely in Congress's court.

1. Congress adopted the verbatim formulation of Rule 10b-5, which gives rise to private remedies

a. First and foremost, Congress "modeled" Section 14(e) after the language in Rule 10b-5 (*Schreiber*, 472 U.S. at 10-11), which was already recognized as creating private rights. *E.g.*, *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971). When Congress invoked the same textual formulation in the same statutory

scheme, there is every reason to think it intended the same result.

Indeed, *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), itself acknowledged this common-sense proposition. See 532 U.S. at 280, 288. It recounted the situation in *Cannon* v. *Univ. of Chicago*, 441 U.S. 677 (1979), where Congress "'patterned'" Title IX after Title VI of the Civil Rights Act of 1964. *Id.* at 280. As the Court explained, when Title IX was enacted, "'the [parallel] language in Title VI had already been construed as creating a private remedy.'" *Ibid.* It thus followed that "Congress had intended Title IX, like Title VI, to provide a private cause of action." *Ibid.*

That same proposition squarely applies here. Both petitioners and the government agree that Congress deliberately "modeled" Section 14(e) on Rule 10b-5. Pet. Br. 3, 16, 17; U.S. Br. 6. It essentially adopted the Rule's verbatim formulation, leaving the two provisions with "nearly identical language." U.S. Br. 6; Pet. App. 9a (recognizing the "shared text"). This gives rise to more than mere presumptions: when Congress enacts "the verbatim statutory text" that courts previously "interpreted to create private rights," it naturally expects the same language to produce the same result. *Sandoval*, 532 U.S. at 288. Because Congress "patterned" Section 14(e) on the "parallel" language in Rule 10b-5 (Pet. Br. 30 n.8), it was inherently authorizing the same private action that courts had already accepted for decades under that Rule. See, *e.g.*, *Cannon*, 441 U.S. at 696-698.[14]

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[14] Section 14(e) also closely tracks the language of Rule 14a-9, which *Borak* had just declared privately enforceable. *Borak*, 377 U.S. at 430-432; compare 15 U.S.C. 78n(e), with 17 C.F.R. 240.14a-9(a). This near-verbatim tracking is yet another reason to think Congress understood its new law supported private actions. See, *e.g.*, 113 Cong.

b. i. The government resists this straightforward construction for two reasons, but both are wrong.

First, the government admits that Section 14(e) "adopts language nearly verbatim from Rule 10b-5," which is privately enforceable. Br. 31. But, according to the government, because that same language is also found in Section 17(a), the relevant text has not been "uniformly" construed to create private rights. *Ibid.*

The government is confused. It makes no difference whether Section 17(a) is privately enforceable because (as all sides agree) *Congress modeled Section 14(e) on Rule 10b-5*, not Section 17(a). *Schreiber*, 472 U.S. at 10-11. The only relevant question is thus how Congress understood the language of Rule 10b-5, and it is "beyond peradventure" that Rule 10b-5 was understood as privately enforceable at Section 14(e)'s enactment. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 380 (1983). When Congress chooses language that courts have already said is privately enforceable, then Congress has every expectation that using the "verbatim" text will produce the same result in the new provision. The question of legislative intent is thus obvious: Congress modeled Section 14(e)'s language after the language of a *specific* rule that everyone agreed was privately enforceable. It makes no difference if some other provision (that Congress was *not* copying) has a different meaning.[15]

Rec. 24,665 (1967) (confirming that the new additions were "patterned on the present law and the regulations which govern proxy contests") (statement of Sen. Williams); *Indiana Nat'l Corp.* v. *Rich*, 712 F.2d 1180, 1183 (7th Cir. 1983); see also *Cannon*, 441 U.S. at 694, 696-698; *Polaroid Corp.* v. *Disney*, 862 F.2d 987, 995-996 (3d Cir. 1988).

[15] Indeed, as petitioners specifically concede, "Congress modeled Section 14(e) on Rule 10b-5, not Section 17." Pet. Br. 28 n.10; see also U.S. Br. 6.

In any event, the government's position suffers from a chronology problem. The "'relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.'" *Cannon*, 441 U.S. at 711. Even if Congress had glanced at Section 17(a), there was apparently not a single case declaring that section non-privately enforceable in 1968. On the contrary, "[b]efore this Court's decision in *Aaron*, several courts of appeals had inferred a private right of action under Section 17(a), usually by analogy to Section 10(b)." Pet. Br. 44 (so conceding). If anything, this suggests Section 17(a)'s contemporary treatment would have only reaffirmed that the language in Section 14(e) would create private rights.[16]

This reading is supported by *Sandoval* itself. The relevant inflection point is the period the legislation was enacted, and the question is thus whether "courts had *previously* interpreted [the parallel text] to create a private right of action." 532 U.S. at 288 (emphasis added). There is no legal or logical basis for asking what courts *subsequently* did more than a decade after the fact. Here, at the time of Section 14(e)'s enactment, courts had construed the relevant text one way—in favor of a private right of action. There is nothing in Section 17(a) that casts any doubt on the consistent treatment of the baseline language in Rule 10b-5, which, again, was the relevant "model" for Section 14(e). *Schreiber*, 472 U.S. at 10-11.

Finally, the government's other errors aside, there is no rule that says the text must "uniformly" support a private action (U.S. Br. 31), and the government's contrary

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[16] In their lengthy submissions, neither petitioners nor the government cite a single decision declaring that Section 17(a) did not create private rights until a decade *after* Section 14(e)'s enactment. See U.S. Br. 31; Pet. Br. 44-45 & n.13.

view ignores the doctrine's animating rationale. This is ultimately a matter of "congressional intent." *Touche Ross*, 442 U.S. at 578; see also *Sandoval*, 532 U.S. at 286-287 (declaring "Congress's intent" the ultimate touchstone). The question is what the legislature had in mind when it chose a specific set of words for the statute. Where it self-consciously models legislation after a provision that courts universally accept as privately enforceable, there is no basis for courts to ascribe those same words the opposite effect, especially not *half a century* later. The government's plea would not honor Congress's statutory choices, but subvert them.

Second, the government also hints that it may be inappropriate to attribute any meaning to Congress's choice to mirror the words in Rule 10b-5, because that is merely a rule, and "Section 14(e) d[id] not incorporate the actual 'statutory text' of Section 10(b)." U.S. Br. 31. This is legally and logically meritless. The principle, again, is rooted in the notion that Congress is put on notice of the effect of using certain language. It makes no difference whether that language is borrowed from a statute, a regulation, a rule, or a cocktail napkin. All that matters is that "courts had previously interpreted [the verbatim text] to create a private right of action." *Sandoval*, 532 U.S. at 288. The fact that previous *examples* of this rule's application happened to involve statutes is wholly besides the point.

ii. For their part, petitioners do not even acknowledge this doctrine at all. They repeatedly say (*e.g.*, Br. 38 n.10) that Section 14(e) is directly "bas[ed]" on Rule 10b-5 (in attempting to establish a scienter requirement), but they immediate ignore the consequences of that observation: The verbatim invocation of the old language means the

new language receives the same treatment. *Sandoval*, 532 U.S. at 288.[17]

In short, the courts recognized a private right under Section 10(b) and Rule 10b-5, which served as the linguistic model for Section 14(e). Congress understood that, when it used those words, the new section (like the old one) would be privately enforceable. *Sandoval*, 532 U.S. at 288; *Cannon*, 441 U.S. at 699. This Court routinely asks what statutory terms meant at the time of their enactment (*e.g.*, *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070 (2018)), and this doctrine is cut from the same cloth. There is no basis for assigning these words a different meaning than they had when Congress enacted them, and nothing in this Court's implied-rights jurisprudence abandons that traditional respect for Congress's choices.

2. Congress enacted Section 14(e) to mirror the existing treatment of Section 14(a), which gives rise to private remedies

Eliminating the private action under Section 14(e) would also make nonsense of the statutory scheme. Congress's express purpose in the Williams Act was to eliminate the "gap" between the rules for proxies and tender offers, and Congress acted after this Court already held

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[17] Nor does Congress's use of Rule 10b-5's language establish that Section 14(e) requires scienter (because Rule 10b-5, per *Ernst*, requires scienter). Contra Pet. Br. 30. Section 14(e) was enacted in 1968, when the courts were split over Rule 10b-5's culpability standard. See *Ernst*, 425 U.S. at 193 n.12. It was not until 1974 that this Court resolved that debate—and did so because of the controlling language of *Section 10(b)*, Rule 10b-5's authorizing statute. *Id.* at 212-214. At the relevant time, Congress chose language that is consistent with negligence, not scienter (see Part I, *supra*), and courts had already accepted that language created private rights. There is no indication that Congress intended to depart from the overwhelming consensus on that issue.

that the proxy rules were privately enforceable. There is no basis for thinking Congress intended to create polar-opposite liability schemes in legislation designed to "harmoniz[e]" these two areas. U.S. Br. 11-12 (so conceding).

Petitioners' contrary view would leave an anomaly in the securities laws and frustrate Congress's aim to put each scheme (proxies and tender offers) on equal footing. This Court has expressly held that, as with any other statutory question, Congress's intent to create a private remedy may sometimes "appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979). The only sensible reading here is that Congress knew what it was doing when it adopted language that had long-given rise to a private action: Section 14(e), like its counterpart in Section 14(a), was privately enforceable.

a. In *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), this Court established that Section 14(a) and Rule 14a-9—regulating corporate proxy materials—create a private right of action. 377 U.S. at 430-433. Even though those provisions lacked any express indication of a private remedy, *Borak* held they were privately enforceable to effectuate Congress's "purpose" under Section 14(a). *Borak*, 377 U.S. at 433.[18]

While Section 14(a)'s existing scheme regulated proxy solicitations, there was no comparable regulation for tender offers. The Williams Act was designed to fill the "gap" between the two schemes (*Piper* v. *Chris-Craft Indus.*,

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[18] Section 14(a) declares it "unlawful" to solicit proxies in violation of SEC rules, and Rule 14a-9 "prohibits solicitations 'containing any statement which * * * is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading * * *.'" *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 383 (1970).

Inc., 430 U.S. 1, 27 (1977)), thus "achiev[ing] Congress's goal of harmonizing the regulation of tender offers with the regulation of proxy solicitations under Section 14(a)." U.S. Br. 11-12; see also, *e.g.*, 113 Cong. Rec. 24,664 ("[a]ll have recognized the need to fill the existing gap") (statement of Sen. Williams). In doing so, Congress enacted a series of "parallel" rules for tender offers, including Section 14(e), which replicates Section 14(a)/Rule 14a-9's core protection. See U.S. Br. 24.

In considering the Williams Act, multiple witnesses testified before Congress that *Borak*'s logic would apply to Section 14(e), rendering the new regulation privately enforceable. See *Senate Comm. on Banking and Currency: Hearings Before the Subcomm. on Securities on S. 510*, 90th Cong., 1st Sess. 67 (1967) (statement of Prof. Carlos L. Israels); *id.* at 140 (statement of Prof. William H. Painter).

b. The government repeatedly acknowledges the "intended symmetry" between these two areas. U.S. Br. 23. But when it comes to explaining why only one gives rise to a private action, the government says—nothing. *Borak* first held that the proxy regulations were privately enforceable, and the Williams Act then sought to harmonize the two areas. *E.g.*, *Bath Indus., Inc.* v. *Blot*, 427 F.2d 97, 110 (7th Cir. 1970). The government could not identify a single reason that any rational legislative body would wish to authorize private actions under Section 14(a) but not Section 14(e). They both govern effectively indistinguishable transactions; each involves the same attempt to merge the same companies, preceded by the same disclosures to the same shareholders. The only difference is immaterial in any relevant sense: whether the transaction is carried out via a proxy solicitation or tender offer. And Congress specifically sought to eliminate the "sharp contrast" between the two. H.R. Rep. No. 1711, 90th Cong.,

2d Sess. 2-3 (1968) ("The cash tender offer is similar to a proxy contest, and the committee could find no reason to continue the present gap in the Federal securities laws which leaves the cash tender offer exempt from disclosure provisions.").

This Court's "modern" private-right-of-action jurisprudence imposes a high bar on recognizing a private remedy, but it does not require courts to abandon all the usual tools of statutory construction or check common sense at the door. At its irreducible core, the question is still one of statutory intent (*Sandoval*, 532 U.S. at 286; *Touche Ross*, 442 U.S. at 575-576), and Congress's intent here could not have been clearer: It understood from *Borak* and cases under Rule 10b-5 that its verbatim formulation would support private actions, and it enacted Section 14(e) to align the regulations for the two schemes. See, *e.g.*, *Cannon*, 441 U.S. at 698-699 & n.22; *id.* at 718 (Rehnquist, J., concurring). It is absurd to think the same Congress, acting against this backdrop, intended to create a puzzling discontinuity because it failed to invoke any additional "magic words."

In short, "unless we're going to revisit *Borak*—and literally a 50-plus year understanding of the liability scheme for proxies—it makes no sense to say that plaintiffs are prohibited from suing for misrepresentations in tender offers under 14(e) while still permitting claims for false proxy statements under 14a-9." Ann Lipton, *The Puzzle of Emulex*, Business Law Prof Blog (Jan. 12, 2019) <tinyurl.com/securities-expert-on-emulex>. Neither petitioners nor the government can explain the blatant anomaly their theory would introduce in a securities regime

that has sensibly governed the economy for half a century.[19]

3. Courts have uniformly held that a private right exists for the past 50 years, and Congress has made no attempt to disturb this settled practice

Section 14(e)'s private right of action has now been a settled feature of the securities laws for decades. This Court itself announced elements of Section 14(e)'s private right of action over thirty years ago, and the courts of appeals have uniformly held a private claim exists for half a century. Notwithstanding this overwhelming judicial consensus, Congress has not once cast any doubt on the claim's legitimacy, even when revamping the securities laws.

We are unaware of any situation, involving any other law, where the Court has rejected a private right of action that has become so entrenched for so long, without any hint of dissent or disapproval from the courts or political branches. If petitioners wish to suddenly upend this practice, their proper audience at this point is Congress, not this Court.

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[19] Indeed, under their position, corporations would largely be able to infringe shareholders' suffrage rights by structuring mergers via a tender offer instead of a vote after a proxy solicitation. See, *e.g.*, Lipton, *supra*. Furthermore, petitioners and their amici overlook that corporations themselves have relied on a private right of action under Section 14(e) to challenge misleading disclosures in the context of hostile or competing tender offers. *E.g.*, *Gas Nat.* v. *E.ON AG*, 468 F. Supp. 2d 595 (S.D.N.Y. 2006); *Taro Pharm. Indus.* v. *Sun Pharm. Indus.*, 2010 U.S. Dist. LEXIS 84163 (S.D.N.Y. July 13, 2010); *Casey's Gen. Stores, Inc.* v. *Alimentation Couche-Tard, Inc.*, No. 4:10-cv-00265, 2010 U.S. Dist. LEXIS 101129 (S.D. Iowa Sep. 8, 2010).

a. According to petitioners and the government, this Court has not yet recognized a private right of action under Section 14(e). U.S. Br. 30-31; Pet. Br. 51. Yet in *Schreiber* v. *Burlington N., Inc.*, 472 U.S. 1 (1985), this Court *construed the elements* of a Section 14(e) private claim, without even hinting that the claim's existence was debatable. 472 U.S. at 2, 4, 12-13. It did not reserve the question, as it had done in *Piper* (which *Schreiber* cited three times). And it is inconceivable that the Court would have announced the elements of the claim without flagging for lower courts that the claim itself might not exist. The only explanation is the Court believed the question was settled by 1985 given the "overwhelming weight of authority" in the lower courts. *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 n.20 (5th Cir. 1974).[20]

This Court is not in the habit of construing the elements of imaginary claims. When it decided *Schreiber*, it put Congress on clear notice that the courts, including this Court, were entertaining private actions under Section

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[20] While *Piper* technically left the question open (430 U.S. at 42 n.28), it all but suggested shareholders had a private right of action. It repeatedly noted that Congress viewed shareholders as the "expressly protected class"; it suggested that non-tendering shareholders "could perhaps state a claim under § 14(e)"; and it affirmed that "the sole purpose of the Williams Act was the protection of investors." *Id.* at 35, 37-39. Indeed, the majority rejected out of hand the dissent's suggestion that it was depriving interested parties of "'effective enforcement,'" noting that its "narrow" holding solely eliminated standing for "a tender offeror[] suing in his capacity as a takeover bidder." *Id.* at 42 n.28. That would have been an empty response if the majority genuinely doubted that shareholders could lodge their own private actions.

14(e). If Congress felt those actions should not exist, it assuredly would have said so at some point over the last 35 years.[21]

b. Indeed, for half a century now, the courts have consistently authorized private actions under Section 14(e), and Congress has failed to repudiate that expansive body of authority. Compare, *e.g.*, *Touche Ross*, 442 at 577 n.19 (explaining the Court previously "acquiesced in the 25-year-old acceptance by the lower federal courts of an implied action under § 10(b)"); *Blue Chip Stamps*, 421 U.S. at 730 (accepting the "overwhelming consensus" that "a [private] cause of action did exist").

Every known circuit to have confronted the question has held that Section 14(e) is privately enforceable. See, *e.g.*, *Flaherty & Crumrine Preferred Income Fund, Inc.*, 565 F.3d 200 (5th Cir. 2009); *In re Digital Island Sec. Litig.*, 357 F.3d 322 (3d Cir. 2004); *Polaroid Corp.*, 862 F.2d at 995-996; *Feldbaum* v. *Avon Prods., Inc.*, 741 F.2d 234 (8th Cir. 1984); *Stull* v. *Bayard*, 561 F.2d 429, 432 (2d Cir. 1977); see also U.S. Br. 27 (conceding that "lower courts have long permitted private litigants to pursue claims under Section 14(e)"). And despite this consensus, Congress has repeatedly revamped core features of securities litigation without once suggesting that these private rights should not exist. And what Congress has done instead is telling.[22]

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[21] This Court has since included *Schreiber* in a list of other established implied rights of action. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172-173 (1994). Unlike this Court, however, neither petitioners nor the government even acknowledge *Schreiber*'s formal adjudication of a Section 14(e) private claim.

[22] Petitioners' sheepish concession that "some" lower courts (Br. 2) have so held is a remarkable understatement. And that is especially

First, Congress amended Section 14(e) itself in 1970 after multiple courts of appeals had already declared Section 14(e) privately enforceable. See *Susquehanna Corp.* v. *Pan Am. Sulphur Co.*, 423 F.2d 1075, 1076-1077 (5th Cir. 1970); *Electronic Specialty Co.* v. *Int'l Controls Corp.*, 409 F.2d 937, 946 (2d Cir. 1969) (Friendly, J.). Congress was presumably aware of those authorities, and yet it refused to eliminate Section 14(e)'s private action while amending the section. This effectively ratified those decisions. See, *e.g.*, *Caleb & Co.* v. *E.I. Du Pont de Nemours & Co.*, 615 F. Supp. 96, 99 (S.D.N.Y. 1985) ("By 1970 the courts had created a private right of action under § 14(e) * * * and Congress may be deemed to have been aware that the courts were upholding private rights of action directly under § 14(e)."); see also *Indiana Nat'l Corp.*, 712 F.2d at 1184.[23]

Second, Congress added an insider-trading prohibition to the Exchange Act in 1988. See Insider Trading and Securities Fraud Enforcement Act, Pub. L. No. 100-704, 102 Stat. 4680. This provision authorized a private action against insider trading (15 U.S.C. 78t-1(a)), yet instead of eliminating Section 14(e)'s private claims, Congress preserved all existing "express or implied rights of action." 15 U.S.C. 78t-1(d) ("Nothing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter.").

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true given petitioners' failure to cite a single relevant decision supporting their novel theory.

[23] That amendment added the second sentence to Section 14(e), granting the SEC additional rulemaking authority. See Act of Dec. 22, 1970, Pub. L. No. 91-567, § 5, 84 Stat. 1497-1498.

This reservation is especially significant because Congress specifically noted that "insider trading" was already "prescribed by provisions of the securities laws, including * * * [Section] 14(e)" and "the case law that has developed over time interpreting those provisions." H.R. Rep. No. 910, 100th Cong., 2d Sess. 8 (1988); see also *id.* at 26 ("Although the courts have recognized an implied private right of action in insider trading cases, this section would codify an express right of action * * *."). Congress thus expressly reaffirmed, not repudiated, implied rights of action in an area that directly overlaps with Section 14(e) and "the case law * * * interpreting [it]." That "case law" presumably includes decisions deeming Section 14(e) privately enforceable.

Finally, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, to curb litigation abuse, but again refused to eliminate Section 14(e)'s private right of action. Indeed, not only did Congress modify pleading standards for all "private action[s]" (15 U.S.C. 78u-4(b)(1))—which presupposes *those actions rightfully exist*—but it also created a safe harbor for certain "forward-looking statements," including those "made in connection with a *tender offer*." 15 U.S.C. 78u-5(b)(2)(C) (emphasis added). That protection targeted "private action[s]" based "on an untrue statement of a material fact" or a material "omission." 15 U.S.C. 78u-5(c)(1). This new provision thus covers the core subject-matter of Section 14(e), creating the unmistakable impression that Congress was aware of private litigation under that section. It is implausible that Congress left that extensive, uniform body of authority untouched if

it actually disagreed with it. See *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008).[24]

4. Petitioners and the government have failed to cast any genuine doubt on this settled regime

According to petitioners and the government, Section 14(e) flunks the "modern" test for creating a private right of action, and the overwhelming contrary authority is simply wrong. This is specious. It would be rare indeed for so many judges to get something so wrong over such an extended period of time. As it happens, however, neither petitioners nor the government truly grappled with the key considerations supporting Section 14(e)'s private action. And the novel arguments they did lodge—which apparently not a single court has accepted—fall short.[25]

a. As an initial matter, contrary to the other side's contention, we are not relying on *Borak*'s (discredited) rationale or the fact that Section 14(e) was enacted during the "heyday" of the Court's old implied-rights jurisprudence. Pet. Br. 19; U.S. Br. 29. As established above, Section 14(e) is privately enforceable for reasons recognized,

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[24] Petitioners lean on Section 203 of the PSLRA, which declares that the Act shall not "be deemed to create or ratify any implied private right of action, or to prevent the Commission, by rule or regulation, from restricting or otherwise regulating private actions under the Securities Exchange Act." Pub. L. No. 104-67, § 203, 109 Stat. 762. This generic disclaimer cannot overcome the salient point: Congress confronted the type of Section 14(e) private litigation authorized by courts everywhere, and yet declined to eliminate this longstanding private right of action. Petitioners are asking this Court to accomplish via judicial fiat what they failed to achieve via the political process.

[25] The government resists the notion that it is engaged in another flip-flop from its prior position before the Court. See U.S. Br. 28 (correctly noting the SEC's contrary position in the *Piper* case). But it is unusual to blame the government's past position on pre-*Cort* case law when *Piper* itself was a post-*Cort* case.

today, in this Court's jurisprudence—and reasons that derive inexorably from Congress's intent "to create [a] private right of action." *Sandoval*, 532 U.S. at 286. It may indeed be a "high bar" to establish that "Congress *intended* to provide a cause of action even though Congress did not expressly say as much in the text of the statute" (*Johnson* v. *Interstate Mgmt. Co.*, 849 F.3d 1093, 1097-1098 (D.C. Cir. 2017) (Kavanaugh, J.)), but this unique confluence of factors clears the threshold.

In any event, although not relevant to our primary arguments, the government and petitioners overstate their case. Section 14(e) may not have traditional "rights-creating" language (U.S. Br. 30), but the *entire statute* was designed to create rights. The Williams Act's "sole[]" purpose was to disclose information to shareholders for making informed decisions. *Piper*, 430 U.S. at 31. It rewrites the statutory history (and this Court's authority) to declare the Act was focused solely on prohibiting wrongful acts by defendants (U.S. Br. 30; Pet. Br. 31) as opposed to benefiting the investing public.[26]

b. According to petitioners (Br. 48-49), Section 14(e) cannot support *implied* remedies because the securities laws already provide *express* remedies. And petitioners perceive two such sets: (i) the SEC rulemaking delegation in Section 14(e)'s second sentence; and (ii) the express

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[26] Although *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979), refused to imply a right of action under Section 17(a) of the Exchange Act, the case is easily distinguishable. A few examples: That provision was part of the original 1934 Act, not a subsequent amendment; Congress did not frame the provision using a verbatim formulation known to create a private action; Congress did not enact the provision immediately after *Borak* declared a parallel provision (using nearly parallel language) privately enforceable; and Congress did not aim to "harmonize" Section 17(a) with other companion private remedies. In short, it shares none of the unique factors driving the analysis here.

causes of action found elsewhere throughout the Acts. This is twice wrong.

As for Section 14(e)'s delegation to the SEC: This is a *rulemaking* delegation to enable the SEC to better define and proscribe certain "fraudulent, deceptive, or manipulative" devices. 15 U.S.C. 78n(e). Once the SEC promulgates its rules, those rules are then *enforced* via the Acts' remedies, which, of course, include Section 14(e)'s longstanding private right of action. Petitioners have simply misunderstood the point of this provision.

As for the Acts' express causes of action: Congress enacted the Williams Act against a backdrop where implied rights *were* recognized despite the existence of express remedies. So the Congress that enacted Section 14(e) obviously did not expect the existence of *some* express actions to foreclose an implied action under the new provision—just as the same express actions failed to foreclose implied actions under Rule 10b-5 or Section 14(a). *Herman & MacLean*, 459 U.S. at 380; *id.* at 383 (explaining that the securities laws tolerate "overlap" between remedies, and "Congress rejected the notion that the express remedies * * * would preempt all other rights of action").

c. The government argues that even if the Court eliminates Section 14(e)'s longstanding right of action, shareholders *might* have recourse under other provisions. Br. 31. This is cold comfort. Congress provided rights under Section 14(e) to protect the *precise* interests from the *precise* harm in the tender-offer setting. If it felt investors were adequately protected by other laws, it would have had no reason to enact Section 14(e) in the first place.

And a quick walk through the government's proposal highlights its flaws. The government's "solution" involves navigating "preempt[ion]" under the Williams Act, "preclu[sion]" under SLUSA, leaving some conduct unprotected, and trying to mix-and-match non-Section 14(e)

statutes to accommodate a *Section 14(e)* violation. Br. 31-32 & n.4. This takes a clear, administrable scheme and replaces it with a patchwork of coverage—requiring courts to waste time figuring out what other provisions (besides Section 14(e)) might apply to Section 14(e) violations.

The better answer is the one that has functioned effectively for the past 50 years: When a party is prejudiced by a violation of Section 14(e), a party seeks redress under Section 14(e). That plainly reflects Congress's intent when it enacted the statute, and there is no basis for the judiciary to countermand that determination more than half a century down the line.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In the Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

The question presented is whether Section 14(e) of the Securities Exchange Act of 1934 supports an implied private right of action for mere negligence. As we explained in our opening brief, there are two ways the Court could approach that question. Taking the Ninth Circuit's decision based on that court's own premise that an inferred private right of action exists under Section 14(e) for intentional violations, the Court could hold that the Ninth Circuit erred in *expanding* that inferred right to cover negligence. Or, the Court could hold that there is no basis to infer *any* private remedy under Section 14(e) at all.

The government, joined by the SEC, argues that this Court should decide this case on the "predicate" ground that Section 14(e) does not confer any private right of action. U.S. Br. 27-28 (citation omitted). In return, Respondents focus on just evading the issue, arguing waiver. But as the government explains (at 27-28), this argument is properly before the Court. And on the merits, it becomes clear why Respondents focus on waiver. They have no real answer for how one could possibly infer any private cause of action from Section 14(e) under the stringent test in *Alexander v. Sandoval*, 532 U.S. 275 (2001). Indeed, Respondents concede (at 44) that Section 14(e) lacks "'rights-creating' language." That is the end of the ball game under this Court's modern test. And, especially in light of the SEC's own position, recognizing the absence of any private right of action is now the simplest path to resolving this case.

Nevertheless, even assuming that a private remedy could be inferred under Section 14(e) for intentional violations, the Ninth Circuit erred in

expanding that private remedy to cover negligence. On this argument, the government agrees with Respondents that the text of Section 14(e) itself does not require scienter. U.S. Br. 10-12. That reading is flawed, but more importantly, it is incomplete. The question here is not the scope of Section 14(e) in the abstract. Instead, it is whether a court should infer a private remedy for negligence under Section 14(e)—an inquiry that must consider the surrounding provisions and structure of the securities laws as well. On that question, the government hardly joins Respondents. Indeed, it appears to recognize (at 19-20, 32) that the full statutory record, including the "procedural limitations" Congress imposed on the express causes of action for negligence under the 1933 Act, support the conclusion that Congress did *not* intend to create an unstated private negligence remedy for violations of Section 14(e).

The government's brief underscores how the two ways of looking at this case are interrelated. But either way, the Ninth Circuit erred in inferring an unstated, and previously unknown, private right of action for negligent violations of Section 14(e).

ARGUMENT

I. AS THE GOVERNMENT EXPLAINS, SECTION 14(e) DOES NOT CREATE ANY PRIVATE RIGHT OF ACTION AT ALL

In *Alexander v. Sandoval*, 532 U.S. 275 (2001), this Court declared that it was getting out of the business of inferring private rights, after singling out *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), as epitomizing the old regime it was "abandon[ing]." 532 U.S. at 287. Respondents ask this Court to turn back the clock. Indeed, the central theme of their brief is "*Borak*

lives!"—or ought to. Not only do Respondents cite *Borak* "*passim*" (at V) and repeatedly invoke its purpose-driven analysis for inferring private remedies, but they argue that this Court must double down on *Borak*: Having inferred a private remedy under Section 14(a) of the 1934 Act in *Borak*, Respondents say (at 35-38), the Court must follow suit under Section 14(e) now. But two wrongs have never made a right. And, as the government explains (at 27), under the *governing* test for determining whether a court may infer a private right—*Sandoval*'s—"private litigants like respondents may not sue for violations of Section 14(e)."

A. Respondents' Waiver Argument Fails

No doubt this explains why Respondents' primary response is *not* to argue that an inferred private right exists under the *Sandoval* test, but to argue (at (I), 7, 26-27) that the Court should simply ignore the elephant in the room because this broader argument was purportedly waived. That is incorrect.

First, as the government explains, "the determination whether a private right exists is 'predicate to an intelligent resolution of the question' whether Section 14(e) encompasses negligent misrepresentations." U.S. Br. 27-28 (quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996)). Indeed, it is "impossible to consider whether" Section 14(e)'s private right extends to negligence "without first assuming" that such a right exists. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 381 (1995). That is precisely the sort of intertwined relationship between arguments that this Court has held makes an issue fairly "embraced within" the question presented and ripe for resolution. *Id* at 382.

In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, for example, this Court "*sua sponte* directed the parties to address [the] question" whether a private cause of action against aiders and abettors exists under Section 10(b) of the 1934 Act, even though the petitioners there had "*assumed* the existence of [such] a right" at the certiorari stage. 511 U.S. 164, 194-95 (1994) (Stevens, J., dissenting); *see id.* at 170 (majority). Here, Petitioners indisputably raised the argument at the certiorari stage, making this an *a fortiorari* case under *Central Bank* for considering whether any private right exists.

Second, the case for review is even stronger here because Petitioners even raised the broader argument below, telling the Ninth Circuit in their en banc petition that a ruling that Section 14(e) sweeps in negligence would be "grounds for *eliminating* [that court's] implied private right of action." CA9 Pet. for Reh'g 14. It would have been futile for Petitioners to advance this argument earlier under existing circuit precedent. *See Yovino v. Rizo*, 139 S. Ct. 706, 708 (2019). And although Respondents now claim (at 27) that Petitioners were required to say more (and should be faulted for not *disputing* that precedent at the panel stage), they fail to recognize the interrelationship between the narrower and broader arguments for why the Ninth Circuit was wrong.

Third, it is settled that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim" before this Court. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Petitioners have always maintained that private parties cannot recover under Section 14(e) for mere negligence; the contention that Section 14(e) does not create *any* private remedy is just another argument in support of

that claim. Thus, the argument could be considered by this Court even if petitioners "expressly disavowed [the argument] in both the District Court and the Court of Appeals." *Lebron*, 513 U.S. at 378-79.

B. Respondents Do Not Come Close To Meeting The *Sandoval* Test

On the merits, Respondents essentially concede that they cannot satisfy the *Sandoval* test for establishing an implied private right. So they focus their argument on urging this Court to go around *Sandoval*—even going so far as to argue that the Court should (and must) follow *Borak* instead.

1. Respondents essentially concede that they cannot meet the Sandoval *test.*

Under the two-part framework set forth in *Sandoval*, Respondents all but admit that Section 14(e) does not create any private right of action.

Respondents concede that Section 14(e) does "not have traditional 'rights-creating' language." Resp. Br. 44 (citation omitted). To fill this glaring omission, Respondents argue that "the entire statute was *designed to* create rights." *Id.* (emphasis altered). But that is just a request to revert to the kind of purpose-driven rationale that this Court rejected in *Sandoval*. 532 U.S. at 287; *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) ("[T]he mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf."). Instead, "'[t]he question whether Congress . . . intended to create a private right of action [is] definitively answered in the negative' where a 'statute *by its terms* grants no private rights to any

identifiable class.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002) (alterations in original) (emphasis added) (citation omitted). Under *Sandoval*, Section 14(e)'s lack of rights-creating language is fatal.

Respondents likewise do not attempt to satisfy the second part of the modern private-right-of-action test—whether Section 14(e) manifests an intent to create "a private remedy." *Id.* at 284; *see Sandoval*, 532 U.S. at 290. Nor do Respondents contest that the many express causes of action in the Exchange Act create a "presumption that a [private] remedy was deliberately omitted." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (citation omitted). Instead, they simply assert (at 45) that this presumption should not apply here because Section 14(e) was drafted "against a backdrop where implied rights *were* recognized." But that argument is squarely foreclosed by *Sandoval*, too. 532 U.S. at 287; *see also United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (applying clear statement rule to statute enacted before rule was adopted by the Court).

2. Respondents' efforts to conjure up another basis for inferring a private remedy should be rejected.

Unable to satisfy *Sandoval*'s text-based analysis, Respondents urge this Court to adopt various context-driven exceptions that would blow a hole through *Sandoval* itself. That request should be rejected.

1. Respondents argue (at 30) that this Court should follow *Cannon v. University of Chicago*, 441 U.S. 677 (1979), not *Sandoval*, and hold that Congress must have intended a private right of action under Section 14(e) because it "modeled" Section 14(e) on Rule 10b-5, which is privately enforceable under

Section 10(b). But *Cannon*'s "contemporary legal context" analysis is not an exception to *Sandoval*. *See id.* at 698-99. To the contrary, *Sandoval* makes clear that "legal context matters only to the extent it clarifies text." 532 U.S. at 288; *see id.* at 314 (Stevens, J., dissenting) (criticizing majority for *refusing* to consider "contemporary context" evidence).

Moreover, this case is entirely different from *Cannon*. There, Congress reenacted the "verbatim *statutory* text" (from Title VI). *Sandoval*, 532 U.S. at 288. The language on which Respondents rely here comes from a *regulation* (Rule 10b-5), which cannot itself have created a private cause of action. *See id.* at 291 ("Language in a regulation . . . may not create a right that Congress has not."). Instead, the "statutory text" from which lower courts had inferred a cause of action at the time Section 14(e) was passed was Section 10(b)—which Congress notably did *not* replicate in Section 14(e). *See id.* Accordingly, the *Cannon* analysis simply reaffirms that Congress did not intend to create a private right of action when it used different language in Section 14(e).[1]

2. Respondents next turn to *Borak* and argue that, because Section 14(e) was designed to fill a "gap" left by Section 14(a)'s regulation of proxy statements, and because this Court inferred a private right of action under Section 14(a) in *Borak*, it follows that Congress must have intended an inferred private right of action

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[1] Of course, the fact that Congress adopted Rule 10b-5's language near verbatim in drafting Section 14(e) *does* signal that Congress intended Section 14(e) to have the same substantive *scope* as Rule 10b-5. That conclusion follows from basic statutory interpretation principles. *See infra* at 13-15.

under Section 14(e) as well. Resp. Br. 34-38. This argument should be rejected, too.

To begin with, the notion that Congress must have intended an implied private right in Section 14(e) because this Court had implied one in *Borak* for Section 14(a) is just another version of the "contemporary legal context" analysis rejected in *Sandoval*. 532 U.S. at 287-88; *see Touche Ross & Co.*, 442 U.S. at 577. Just like any other statute, the determination whether Section 14(e) creates an implied private right must be based on *text*, not supposed "expectations." 532 U.S. at 287-88. And, here, the text provides no reason to assume that Congress intended the same result as in *Borak*, because the text of Section 14(e) is completely different than the text of Section 14(a).

That leaves Respondents' argument (at 34 (emphasis added)) that this Court must infer a private remedy under Section 14(e) because "the *purpose* of the Williams Act was to eliminate the 'gap' between the rules for proxies and tender offers." This "purpose"-driven rationale for inferring private rights is exactly what this Court repudiated in *Sandoval*. 532 U.S. at 287-88. Moreover, Congress *did* eliminate that "gap"—by adding a new, substantive prohibition on fraudulent statements in connection with tender offers. As *amicus* Chamber of Commerce explains (at 12 (citing examples)), the Committee Reports indicate that Congress believed this gap-filling measure would be effectuated through *public* enforcement measures. And the SEC itself is not arguing that a private right of action is necessary to effectuate the Williams Act. The plaintiffs' securities bar disagrees, but if they believe the statute needs a private right of action, that is something they can take up with Congress.

3. Finally, Respondents resort to congressional silence—arguing (at 43-46) that Congress has implicitly ratified a private right of action under Section 14(e) by *failing* to overturn lower court decisions finding such an implied right to exist under the now-discredited, pre-*Sandoval* regime. But *Sandoval* squarely rejects this exact ratification-through-silence theory, too. *See* 532 U.S. at 292 (citing *Central Bank of Denver, N.A.*, 511 U.S. at 186).

Moreover, Congress has *not* been silent. In the Private Securities Litigation Reform Act (PSLRA) Congress went out of its way to say that its actions should not be "deemed to create or ratify any implied right of action." Pub. L. No. 104-67, § 203, 109 Stat. 737, 762 (1995). Although Congress was not focusing on the specific issue here, the PSLRA expressly refutes Respondents' hypothesis (at 8-9) that it is "inconceivable" Congress disagrees with this lower court case law "but simply said nothing about it."

In any event, accepting Respondents' rationale on this point would resolve the case *against* Respondents, because the private right of action "the courts have consistently authorized" is one that requires scienter. Resp. Br. 40. If Congress has "ratified" anything, therefore, it is the conclusion that there is *no* private right of action for negligent representations under Section 14(e). It makes no sense for this Court to acquiesce in the decisions of the lower courts by adopting a cause of action *broader* than any court has previously recognized.

The emphatic message of *Sandoval* is that the Court has sworn off the habit of creating private rights based on non-textual considerations like

purpose, expectations, or even silence. There is no reason for this Court to jump off the wagon here.[2]

II. THE NINTH CIRCUIT ERRED IN EXPANDING ITS PREVIOUSLY INFERRED PRIVATE RIGHT OF ACTION UNDER SECTION 14(e) TO NEGLIGENCE

Even if this Court accepts (or assumes) the Ninth Circuit's baseline premise that Section 14(e) created a private right of action for intentional violations, the Ninth Circuit erred in enlarging that right to encompass mere negligence. Respondents' counter-argument is based on the premise that Congress intends the most expansive conception of an implied right possible unless (or until) it says otherwise—the polar opposite of what this Court's cases require.

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[2] Ironically, Respondents' *amici* suggest that there is no reason to reject inference of a private remedy under Section 14(e), because Plaintiffs will just sue under Section 10(b) anyway. Institutional Investors Br. 31-33. That is incorrect. For example, under *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-35 (1975), plaintiffs cannot bring claims under Section 10(b) unless they have actually purchased or sold securities. This requirement applies even where plaintiffs request injunctive relief, a frequent tactic in seeking to coerce "nuisance settlements" for impending transactions. *See, e.g., Cowin v. Bresler*, 741 F.2d 410, 420-22 (D.C. Cir. 1984) (Bork, J.); *Sinovac Biotech Ltd. v. 1Globe Capital LLC*, No. 18-10421-NMG, 2018 WL 5017918, at *5 (D. Mass. Oct. 15, 2018). Because Section 10(b)'s purchase-or-sale requirement has not been applied under Section 14(e), plaintiffs have invoked Section 14(e) to extract those hold-up settlements instead.

A. Once Again, Respondents Ask This Court To Disregard The Restraint Demanded In Implying And Expanding Private Rights

Respondents stress throughout their brief that lower courts have for decades recognized an inferred private right of action under Section 14(e). Resp. Br. 8, 40. But in touting this history, Respondents leave out the salient fact here—up until the Ninth Circuit's decision below, every one of those courts had held that this inferred right required *scienter*. That is important, because Respondents are not just asking this Court to recognize an unwritten cause of action on which the Court has previously reserved judgment (*Piper v. Christ-Craft, Indus., Inc.*, 430 U.S. 1, 42 n.28 (1977)); they are asking this Court to dramatically *expand* the reach of the inferred cause of action the lower courts had previously recognized—to new actors, new circumstances, and a far greater swath of alleged misconduct. *See* Pet. Br. 33-34.

Respondents ask the Court to consider this expansion without any of the restraint this Court exercises in inferring private rights to begin with. Once a court has taken the first step of inferring an unwritten cause of action, they say (at 25), subsequent decisions about whether to expand that inferred cause of action should be guided by a *Borak*-style inquiry into whether "the statutory objective [will be] advanced by capturing" a broader swath of conduct. And in this world, ordinary notions of congressional intent are turned upside down. Unless Congress has imposed a written *limit* on the unwritten cause of action the courts have inferred, the argument goes, the presumption is that Congress intended no such limit. *See* Resp. Br. 25; *see also id.*

at 13 n.5 ("[T]he pertinent point is there most certainly is *not* a textual basis for scienter.").

This approach is profoundly wrong, and this Court has repeatedly rejected it. Implying a private right Congress did not express in a statute is a "hazardous enterprise." *Touche Ross*, 442 U.S. at 571; *see Sandoval*, 532 U.S. at 287-88. And undertaking requests to shape—and especially to expand—such an implied private right is no less hazardous. Accordingly, this Court approaches both inquiries with the same restraint, emphasizing that "[c]oncerns with the judicial creation of a private cause of action caution against its expansion," too. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011); *see also Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018); Pet. Br. 21-22. Respondents never even acknowledge those cases, let alone explain why the caution they call for is misplaced.

Among other things, this Court's restraint means that Respondents bear the burden of showing "'affirmative' evidence of congressional intent . . . *for* an implied remedy, not against it." *Sandoval*, 532 U.S. at 293 n.8 (citation omitted); *see Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 300 (1993) (Thomas, J., dissenting) ("compelling reason" required to add remedy to implied private right). Here, Respondents must also overcome the anomaly that, although they confidently claim (at 5) that "Congress enacted Section 14(e) to create a private right of action premised on negligence, not scienter," it somehow took the world—and even the Ninth Circuit—50 years to discover it.

B. Respondents Identify No Affirmative Evidence That Congress Intended A Private Cause Of Action For Negligence

Respondents cannot make the showing this Court's cases demand. For one thing, the text of Section 14(e) itself, particularly in light of its origins, is best read to require scienter. But even if the Court were to disagree, that is just the beginning of the analysis, not the end. The Court must also consider the surrounding provisions and structure of the 1933 and 1934 Acts. And those provisions show that Congress would *not* have intended an inferred private cause of action to reach all the way to negligence.

1. The text of Section 14(e) does not specify a negligence standard.

To begin with, it is undisputed that Section 14(e) does not specify a negligence standard, or use the kind of language that typically connotes such a standard, like "reasonableness" or "due diligence." But the single-sentence prohibition in Section 14(e) *does* use language that unmistakably refers to intentional deception—"fraudulent," "deceptive," and "manipulative." And even the key terms used in the first clause of Section 14(e)—"untrue" and "misleading"—can be used to refer specifically to intentional (not negligent) deception. Pet. Br. 26 (quoting Oxford English Dictionary definitions). Especially given that those words are used alongside words that unmistakably connote intentional deception, it makes sense to read them in that light.[3]

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[3] Respondents argue (at 14) that this interpretation creates a "surplusage problem" for Section 14(e). But this Court just rejected a similar argument in the context of Rule 10b-5,

Respondents never directly acknowledge these dictionary definitions. The closest they come is the *ipse dixit* declaration (at 10 n.2) that, "[i]n this context, no one reads 'untrue' to mean 'dishonest' or 'misleading' to mean 'deceptive.'" But that simply is not true. Courts have read Section 14(e) for decades to require scienter. And Respondents' interpretation flies in the face of the very rule on which all agree the text of Section 14(e) was modeled. As this Court observed in *Ernst & Ernst v. Hochfelder*, it is "clear that when the Commission adopted [Rule 10b-5,] it was intended to apply only to activities that involved scienter." 425 U.S. 185, 212 (1976).[4]

Specifically, this Court explained that Rule 10b-5 was "drafted in response to a situation clearly involving intentional misconduct," and was clearly designed to protect against "fraud." 425 U.S. at 212 n.32. As the Court put it, "[t]here is no indication in the administrative history of the Rule that any of the

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which contains almost identical language and would be subject to the exact same argument. *See Lorenzo v. SEC*, No. 17-1077, 2019 WL 1369839, at *5 (U.S. Mar. 27, 2019) (recognizing that Rule 10b-5 has both "'general'" and "'specific proscription[s]'" that reach the same conduct, which "'might in other circumstances be deemed "surplusage"'" (citation omitted)).

[4] For its part, the government ignores (at 14) the dictionary definition of "misleading" as well as the fact that "untrue" can mean "dishonest." Meantime, the government argues (at 25-26) that "[c]ommon-law principles" support the conclusion that Section 14(e) proscribes negligence. But as the SEC has previously recognized, at least for damages actions, "[t]he requirement of scienter or fraud was the characteristic requirement in common law actions seeking monetary damages for fraud," and "a private damage action based on negligent misrepresentations would not lie." Brief for the SEC 25 & n.10, *Aaron v. SEC*, 446 U.S. 680 (1980) (No. 79-66).

subsections was intended to proscribe conduct not involving scienter." *Id.* at 213 n.32. When Rule 10b-5 came up for a vote at the Commission, the sole recorded comment was, "Well, . . . we are against fraud, aren't we?" Milton V. Friedman, *Administrative Procedures*, 22 Bus. Lawyer 891, 922 (1967). And if Rule 10b-5 *had* been written to reach mere negligence, it would be *ultra vires* under the delegation in Section 10(b), which—all agree—is limited to intentional wrongdoing. Pet. 30 n.8.

Of course, "untrue" and "misleading" *could* be used in a broader sense that would not require scienter, as the Court in *Aaron v. SEC*, 446 U.S. 680, 697 (1980), concluded was the case in Section 17(a)—which was passed by Congress nearly a decade before Rule 10b-5 was promulgated. *Cf. Ernst & Ernst*, 425 U.S. at 212 (stating "the language of" Rule 10b-5 could be read to reach negligence when "[v]iewed in isolation"). But given the distinctive structure and history of Section 14(e), the better reading is that Congress intended the use of "untrue" and "misleading" in Section 14(e) to refer to fraudulent conduct, just as the SEC necessarily did in Rule 10b-5.

Recognizing that Section 14(e) and Section 17(a) reach different conduct simply gives effect to Congress's intent, as informed by their different structure and distinct statutory histories. *See Aaron*, 446 U.S. at 702-03 (Burger, C.J., concurring).

2. Other provisions refute the notion that Congress intended a private right of action for negligence.

1. In any event, Section 14(e) is just one part of the inquiry. Even if the text of Section 14(e) on its own were best read as "not requiring scienter," U.S.

Br. 16, it hardly follows that Congress intended to create a *private cause of action* for negligence. In deciding whether Congress intended a private remedy for negligence, it is necessary to consider not just the text of the substantive conduct-regulating provision, but also the surrounding provisions and structure for additional evidence of Congress's intent. *See Ernst & Ernst*, 425 U.S. at 207-11. Here, those considerations all weigh decisively against inferring a private action for negligence when it comes to Section 14(e).

For this reason, *Aaron* cannot carry Respondents where they need to go. *See* Resp. Br. 10-13. The suit in *Aaron* was predicated on an express cause of action that entitled the SEC to seek injunctive relief "[*w*]*henever*" it appeared that a person was "engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions" of the 1933 Act. 15 U.S.C. § 77t(b) (emphasis added); *see Aaron*, 446 U.S. at 688. *Aaron* thus had no occasion to consider whether Congress would have intended an inferred private right of action under Section 17(a) to reach those violations.

And as Petitioners pointed out in their opening brief, the lower courts since *Aaron* have overwhelmingly concluded that Congress would *not* have intended a private right of action for negligence under Section 17(a). *See* Pet. Br. 44-45; *Finkel v. Stratton Corp.*, 962 F.2d 169, 175 (2d Cir. 1992). Respondents ignore those cases, but they underscore that identifying "the standard for establishing culpability," Resp. Br. 11 (emphasis omitted), is just *part* of the inquiry here. *See also, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (describing elements beyond just a violation of Section 10(b) that

must be established by a private plaintiff suing under the cause of action inferred from that section).[5]

The government, after focusing the first half of its brief on whether Section 14(e), standing alone, proscribes negligence (U.S. Br. 13-26), ultimately recognizes that identifying the scope of a substantive provision is distinct from identifying the scope of an inferred cause of action created by the courts to enforce that provision. *See id.* at 20, 32-33. It accepts (at 19-20) that the Court has considered such additional factors as the "potential disruptive effects of a negligence-based private damages action" when resolving the scope of an inferred cause of action before, but simply says there is no need to consider those limitations here because no inferred cause of action exists under Section 14(e) at all. It pointedly does *not* argue that an inferred cause of action, if it did exist, would reach to the full boundaries of the government's interpretation of Section 14(e) for SEC enforcement actions under an express cause of action.

2. As this Court recognized in *Ernst & Ernst,* other provisions of the securities laws show that when Congress wanted to express a cause of action for

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[5] Respondents suggest that *Aaron* held the "identity of the plaintiff" and the "nature of the relief sought" are categorically irrelevant to whether a showing of scienter is required in a particular case. Resp. Br. 11 (emphasis omitted) (quoting *Aaron*, 446 U.S. at 691). That is incorrect. The quoted portion of *Aaron* dealt with Section 10(b), not Section 17(a), and simply held that because Section 10(b) itself requires a showing of scienter, a suit alleging a violation of Section 10(b) can never require *less* than that. *Aaron*, 446 U.S. at 691. *Aaron* did not consider (and had no occasion to consider) the impact of its scope-of-liability holding in an express action brought by the SEC on the existence of any inferred private right under Section 17(a).

negligence, it subjected that cause of action to "significant procedural restrictions." 425 U.S. at 209; *see id.* at 207-11 & n.28. Respondents essentially argue (at 12 n.4) that the Court should ignore this part of *Ernst & Ernst*, as if it were idle chatter. But as the government acknowledges, and the Court itself recognized in *Ernst & Ernst*, inferring a private remedy for negligence "[w]ithout such limitations . . . would 'nullify the effectiveness of the carefully drawn procedural restrictions on' certain 'express civil remedies in the 1933 Act allowing recovery for negligent conduct.'" U.S. Br. 20 (quoting *Ernst & Ernst*, 425 U.S. at 208, 210). There is no basis for ignoring that clear evidence of Congress's intent.

To say the least, "it would be 'anomalous to impute to Congress an intention in effect to expand [the implied remedy] beyond the bounds delineated for comparable express causes of action.'" *Central Bank*, 511 U.S. at 180 (citation omitted). In the few provisions of the securities laws where Congress indicated that private suits for negligence were appropriate, it tied those express causes of action to careful limits and protections against abuse. Some of those were substantive, such as limits on the filings and defendants to which the negligence-based causes of action apply. *See* Pet. Br. 33. Others were procedural, such as bond requirements or attorney fee recovery provisions. *See id.* at 31-33. *None* of them is present in Section 14(e) or the inferred cause of action that Respondents ask this Court to apply.

Substantively, Section 14(e) applies to "*any*" statement by "*any*" person made "in connection with *any* tender offer." 15 U.S.C. § 78n(e) (emphases added). As Petitioners explained in their opening brief (at 34, 40), Section 14(e) would thus apply to

inaccurate news stories about a tender offer by a financial journalist or TV commentator. Respondents do not disagree; indeed, they trumpet (at 10 n.2) "Congress's categorical language." But Respondents offer no explanation for why Congress, having been so careful in its express causes of action to apply a negligence standard only against specified defendants and statements, would want an inferred cause of action under Section 14(e) that *lacked* any such limits to impose a negligence standard, too.[6]

The government has no explanation for this glaring disconnect either. Instead, it seems to recognize that these restrictions cut *against* inferring a private remedy for negligence (*see* U.S. Br. 20, 32) and simply notes that these "restrictions do not apply to Commission enforcement actions" (*id.* at 32).

3. As Petitioners explained in their opening brief (at 34-36), allowing Respondents to recover under an inferred cause of action based on negligence also would circumvent the express cause of action in Section 18(a) of the 1934 Act. That provision applies to exactly the sorts of statements on which Respondents are suing here, but does not allow recovery for mere negligence. *See* 15 U.S.C. § 78r(a). Respondents do not dispute they could have brought their claims under Section 18(a) and that, had they done so, they would have needed to show more than negligence. But they claim (at 18-19) that their position does not displace Section 18(a) because Section 18(a) applies only to statements filed with the

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[6] Because this point goes to Congress's intent in 1968, when it passed the Williams Act, it is irrelevant that—as Respondents note (at 18)—the PSLRA adopted procedural protections for *all* securities suits three decades later.

SEC, and Section 14(e) applies to "*any* statement (filed or otherwise) in a tender contest."

But this gets it backwards. Of all the statements made in connection with a tender offer, the ones for which a negligence standard would make the *most* sense would be the mandatory disclosures filed with the SEC. *Cf.* Resp. Br. 21 (arguing that such filings should be subject to "more stringent review"). Yet, Section 18(a) shows that Congress declined to adopt a negligence standard even for such mandatory filings. If the Court were to affirm the Ninth Circuit's decision, no plaintiff who contends that a company has filed a misleading recommendation statement in connection with a tender offer would *ever* sue under Section 18(a); all such claims would be filed under the cause of action inferred from Section 14(e) instead. That is exactly the sort of circumvention this Court refused to facilitate in *Ernst & Ernst*, 425 U.S. at 210.

Once again, the government, for its part, seems to recognize that the inference of a private remedy for negligence that would allow parties to circumvent "the express private causes of action defined elsewhere in the securities laws" is problematic. U.S. Br. 32-33. So it stresses (at 32) that this problem does not impact the SEC, because it enjoys its own express cause of action for violations of Section 14(e).

3. Respondents' resort to statutory purpose and policy is unavailing.

Much of Respondents' position ultimately boils down to the notion (at 19-20) that the Court should extend the Ninth Circuit's inferred cause of action to negligence because to do otherwise would "undermine Congress's objectives." This argument does not just sound like *Borak;* it is explicitly based on *Borak* (at

23). Specifically, Respondents opine (at 22-23) that encouraging securities litigation based on negligent misstatements would have "profound benefits" because "[t]he SEC lacks the resources to monitor each recommendation statement in real-time," and thus needs plaintiffs' lawyers to "keep[] the process honest." Notably, the SEC itself does not make this argument. But more fundamentally, this sort of policy rationale is no more appropriate as a basis for *extending* a cause of action than it is for *creating* one.

Respondents' policy arguments are misguided in any event. For 49 years, until the Ninth Circuit's decision here, no court had ever recognized an inferred cause of action under Section 14(e) that reached merely negligent conduct. Respondents cannot seriously contend that the problem with private securities litigation under Section 14(e) during that time was that it was not *aggressive* enough. And as Petitioners explained in their opening brief (at 40-42), embracing a new negligence standard would not only supercharge the existing "merger tax" that plaintiffs' lawyers seek to extract, but would open up a whole new front of abusive litigation against stock analysts, financial journalists, and others. Respondents do not even try to refute the unquestionably broad reach of their proposed rule—even as they recognize (at 20) that it "makes more sense" to have a scienter standard under Section 10(b) because that provision applies to these same "speakers under no 'obligation' to say anything."

Respondents instead focus on the lower courts' experience with a different provision—Section 14(a). They claim (at 19) that courts "have overwhelmingly recognized that negligence is sufficient to state a claim under Section 14(a)," and say there has been no

"concrete harm" (at 22) in that context. In fact, lower courts are divided about the proper standard in Section 14(a) cases. *See Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 428 (6th Cir. 1980) (adopting scienter requirement under Section 14(a) in case involving suit against outside accountants). Moreover, Section 14(a) simply prohibits violation of "such rules and regulations as the [SEC] may prescribe" relating to proxy solicitations, 15 U.S.C. § 78n(a)(1), and the SEC has drawn those rules to cover a much narrower class of statements than Section 14(e). *See* 17 C.F.R. §§ 240.14a-9, 240.14a-1. Combining a negligence standard with Section 14(e)'s more expansive scope would invite far more abuse.

If history teaches anything, it is that plaintiffs' lawyers will maximize any opportunity to assert violations of the securities laws and, as the PSLRA shows, that dynamic inevitably will lead to abuse. Accordingly, in the end, policy considerations just reinforce that this Court should reject the Ninth Circuit's unprecedented, inferred private right of action under Section 14(e) for mere negligence.

CONCLUSION

The judgment of the court of appeals should be reversed.

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QUESTION PRESENTED

Whether Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), supports a private right of action based on allegations of a negligent misstatement or omission made in connection with a tender offer.

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3 Louis Loss, *Securities Regulation* (2d ed. 1961) 17
5 Louis Loss & Joel Seligman, *Securities Regulation* (3d ed. 1990) 18
Aaron Rachelson, *Corporate Acquisitions, Mergers and Divestitures* (2018) 4
S. Rep. No. 550, 90th Cong., 1st Sess. (1967) 5
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Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 16
Restatement (Second) of Torts (1977) 25
Senate Comm. on Banking and Currency: Hearings Before the Subcomm. on Securities on S. 510, 90th Cong., 1st Sess. (1967) 5
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INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (Commission), administers and enforces the federal securities laws. The question presented in this case concerns the proper understanding of Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), and the extent to which private plaintiffs may obtain relief for alleged misrepresentations made in connection with a tender offer. Because the Court's decision may determine the standard of proof that applies to all civil claims brought under Section 14(e), including those brought by the Commission, the United States has a substantial interest in this case.

STATEMENT

1. a. In response to the 1929 stock market crash, Congress enacted the Securities Act of 1933 (Securities Act), ch. 38, tit. I, 48 Stat. 74 (15 U.S.C. 77a *et seq.*), to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof." *Ibid.* The following year, Congress passed the Securities Exchange Act of 1934 (Exchange Act), ch. 404, 48 Stat. 881 (15 U.S.C. 78a *et seq.*). The Exchange Act "provide[d] for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails," and it reflected Congress's effort "to prevent inequitable and unfair practices on such exchanges and markets." *Ibid.* Like the Securities Act, the Exchange Act "substitute[d] a philosophy of disclosure for the philosophy of *caveat emptor*." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 198 (1963).

To that end, both the Securities Act and the Exchange Act contain provisions that promote disclosure and prohibit fraud. Section 17(a) of the Securities Act makes it

> unlawful for any person in the offer or sale of any securities * * * by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make

> the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. 77q(a).

Section 10(b) of the Exchange Act makes it "unlawful for any person * * * [t]o use or employ, in connection with the purchase or sale of any security * * * [,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. 78j(b). In 1942, the Commission adopted Rule 10b-5 to implement Section 10(b). See 7 Fed. Reg. 3804 (May 22, 1942). Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce * * *
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. 240.10b-5. The language of Rule 10b-5 was "derived in significant part" from Section 17(a). *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213 n.32 (1976).

b. Section 14(a) of the Exchange Act authorizes the Commission to promulgate regulations that protect investors in connection with proxy solicitations conducted by a widely held company. 15 U.S.C. 78n(a). In a proxy solicitation, a company attempts to persuade shareholders to vote to approve a takeover or to install new management that may be more receptive to a takeover. See Aaron Rachelson, *Corporate Acquisitions, Mergers and Divestitures* § 1:151 (2018). Beginning in 1935, the Commission has adopted rules under Section 14(a) to govern the conduct of proxy solicitations. See, *e.g.*, Exchange Act Release No. 378, 1935 WL 29270 (Sept. 24, 1935) (addressing the solicitation of proxies, consents, and authorizations for securities listed on a national exchange). In 1966, it adopted Rule 14a-9, which prohibits false or misleading statements of material fact in the solicitation of proxies. 17 C.F.R. 240.14a-9.

For several decades, however, no similar regulation governed corporate takeovers that were effectuated by tender offer. A tender offer is a mechanism for acquiring control of a target corporation by publicly offering, for a limited time, to purchase a substantial amount of the target company's stock—*i.e.*, by requesting that shareholders of the target company "tender" their shares—at a specified price above the market price. Pet. App. 3a. Where tender offers involve exchanges of securities, the Securities Act may apply, but its requirements do not extend to cash transactions. See 15 U.S.C. 77e. As a result, tender-offer campaigns were often waged with little regard for the accuracy or complete-

ness of the information that was provided to shareholders by tender offerors or the target company's management. See *Senate Comm. on Banking and Currency: Hearings Before the Subcomm. on Securities on S. 510*, 90th Cong., 1st Sess. 15-16 (1967) (Senate Hearings). A person seeking control of a company via a tender offer could operate in "almost complete secrecy," leaving shareholders "without adequate information * * * to decide rationally what is the best possible course of action." H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2 (1968) (House Report); S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967) (Senate Report).

In 1968, Congress enacted the Williams Act, Pub. L. No. 90-439, 82 Stat. 454, to "preserve a neutral setting in which the contenders c[an] fully present their arguments" and "'insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information.'" *Schreiber* v. *Burlington N., Inc.*, 472 U.S. 1, 8-11 (1985) (quoting *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975)). The Williams Act closed "a rather large gap in the securities statutes." *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 27 (1977) (citation omitted). It addressed the discrepancy between proxy solicitations and tender offers—both of which involve requests for shareholder action to effect corporate change—by establishing a regulatory scheme for tender offers comparable to that which already applied to proxy solicitations. See Senate Hearings 13, 19-20, 33; Senate Report 3.

The new regulatory scheme for tender offers required tender offerors and target companies to disclose certain information about a tender offer. 15 U.S.C. 78n(d)(1) and (4). It also added Section 14(e) of the Exchange Act, which both "requir[es] disclosure" and

"contains a broad antifraud prohibition." *Piper*, 430 U.S. at 24. Section 14(e) makes it unlawful for any person

> to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C. 78n(e).

Because Section 14(e) was "modeled on" Rule 10b-5, *Schreiber*, 472 U.S. at 10-11, and Rule 10b-5 was modeled on Section 17(a) of the Securities Act, see *Hochfelder*, 425 U.S. at 213 n.32, the three provisions share nearly identical language. Although the provisions apply in different circumstances, all three prohibit (with slight wording differences) the making or use of "any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 15 U.S.C. 77q(a)(2); see 15 U.S.C. 78n(e); 17 C.F.R. 240.10b-5(b).

c. Two years after enacting the Williams Act, Congress amended Section 14(e) to impose a specific rulemaking requirement: "The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." Act of Dec. 22, 1970, Pub. L. No. 91-567, § 5, 84 Stat. 1497-1498. That provision, which

complements the Commission's general rulemaking authority, see 15 U.S.C. 78w, was designed "to allow the Commission to deal more effectively with the devices sometimes employed on both sides in contested tender offers." S. Rep. No. 1125, 91st Cong., 2d Sess. 4 (1970).

2. This case arises out of a Section 14(e) suit that respondents commenced after petitioner Avago Technologies Wireless Manufacturing Inc. successfully used a tender offer to acquire petitioner Emulex Corporation. Pet. App. 1a-2a.

Emulex was a technology company that produced equipment such as storage adapters and network interface cards. Pet. App. 2a. In 2015, Emulex and Avago announced their intention to merge through a tender offer, under which Avago would pay Emulex's shareholders $8 per share. *Id.* at 2a-3a. That $8 price reflected a premium of 26.4% on Emulex's stock price the day before the announcement. *Id.* at 3a.

In accordance with Commission regulations, see 17 C.F.R. 240.14d-9, 240.14d-101, 240.14e-2, Emulex filed with the Commission a public recommendation statement about the tender offer, see Pet. App. 3a. The statement supported the tender offer and recommended that Emulex shareholders tender their shares. *Id.* at 4a. Among other things, it observed that Emulex shareholders would receive a premium on their stock. *Ibid.* The recommendation statement also included a summary of a "fairness opinion" conducted by Goldman Sachs, which had assessed the merger's effect on shareholders. *Id.* at 3a-4a. The summary conveyed Goldman Sachs's conclusion that the tender offer would be fair to shareholders, and it described several financial analyses that Goldman Sachs had conducted in reaching that conclusion. *Id.* at 4a.

Emulex's recommendation statement did not describe an additional one-page "Premium Analysis" that Goldman Sachs had conducted. Pet. App. 4a-5a; see J.A. 255. In that analysis, Goldman Sachs had concluded that the takeover premium here—a 26.4% premium over Emulex's previous closing price and a 4.8% premium over the stock's 52-week high—was below average, though within the normal range, for mergers involving similar companies. Pet. App. 5a, 39a. According to Goldman Sachs, shareholders of similar companies had received an average of 44.8% over the stock's closing price and 17.6% over the stock's 52-week high. J.A. 255.

The tender offer was completed, and enough Emulex shareholders tendered their shares to consummate the merger. Pet. App. 5a.

3. Respondents, representing a putative class of Emulex shareholders who had tendered their shares, sued petitioners. Pet. App. 5a. They alleged that petitioners had violated Section 14(e) of the Exchange Act by omitting Goldman Sachs's premium analysis from Emulex's recommendation statement. *Id.* at 5a-6a. In respondents' view, without the premium analysis, the recommendation statement "create[d] the materially misleading impression that the premium Emulex's shareholders received was significant, or at the very least in line with premiums obtained in similar transactions." J.A. 181-182.

Petitioners moved to dismiss, arguing, among other things, that respondents had failed to plead that the alleged misrepresentations under Section 14(e) had been made with scienter. Pet. App. 33a-34a. The district court agreed. *Id.* at 33a-51a. It held that Section 14(e) requires scienter, *id.* at 33a-35a, and that respondents had not pleaded facts sufficient to raise "a strong inference

of scienter," *id.* at 37a; see *id.* at 36a-51a. The court therefore dismissed respondents' suit. *Id.* at 57a.

4. a. The court of appeals reversed. Pet. App. 1a-20a. As relevant here, it held that the district court had erred in requiring "proof of scienter" rather than "mere negligence" under Section 14(e). *Id.* at 8a.

The court of appeals began with "[a] plain reading of Section 14(e)." Pet. App. 8a. The court explained that the first clause of Section 14(e)—which prohibits any person from "mak[ing] any untrue statement of a material fact or omit[ting] to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading"—covers behavior distinct from that proscribed by the second clause, which prohibits "fraudulent, deceptive, or manipulative acts or practices." *Ibid.* (quoting 15 U.S.C. 78n(e)). The court described the first clause as "devoid of any suggestion that scienter is required." *Id.* at 16a. The court also observed that the first clause is "nearly identical" to Section 17(a)(2) of the Securities Act, which this Court has construed not to require proof of scienter. *Id.* at 12a-13a; see *Aaron* v. *SEC*, 446 U.S. 680, 696-697 (1980).

The court of appeals acknowledged that five other courts of appeals had previously interpreted Section 14(e) to require scienter. Pet. App. 9a. The court explained, however, that those decisions had "rest[ed] on the shared text found in both Rule 10b-5 and Section 14(e)," without adequate consideration of the "important distinctions * * * that strongly militate against importing the scienter requirement from the context of Rule 10b-5 to Section 14(e)." *Ibid.* The court further explained that this Court had construed Rule 10b-5 to require scienter not based on the text of the Rule itself,

but because of "the relationship between Rule 10b-5 and its authorizing legislation, Section 10(b)." *Id.* at 10a-11a (citing *Hochfelder*, 425 U.S. at 212). Observing that Section 14(e) does not include similarly constraining language, *id.* at 11a-12a, the court of appeals concluded that "the first clause of Section 14(e) requires a showing of only negligence, not scienter," *id.* at 16a. It remanded the case to the district court "to reconsider [petitioners'] motion to dismiss under a negligence standard." *Id.* at 20a.

b. Judge Christen concurred in full but wrote separately to emphasize her view that, under this Court's decisions in *Hochfelder* and *Aaron*, Section 14(e) does not require scienter. Pet. App. 20a-26a. She suggested that the several contrary court of appeals decisions had relied on reasoning that pre-dated *Hochfelder* and *Aaron*, *id.* at 21a-22a, 25a-26a, and she questioned "the continuing viability of the foundation for" those decisions, *id.* at 26a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that Section 14(e) of the Exchange Act, 15 U.S.C. 78n(e), prohibits negligent misstatements and omissions of material fact. The scienter standard that petitioners urge has no basis in the text or purpose of the Williams Act.

Section 14(e) imposes two distinct prohibitions. That provision makes it unlawful for any person, in connection with a tender offer, (1) "to make any untrue statement of a material fact" or any misleading omission, or (2) "to engage in any fraudulent, deceptive, or manipulative acts or practices." 15 U.S.C. 78n(e). The first clause of Section 14(e) contains no express scienter requirement. Nor does it contain words like "fraudulent" or "manipulative," which appear in the second clause

and are generally associated with deliberate wrongdoing. And because the second clause "is meant to cover additional kinds of illegalities—not to narrow the reach" of the first clause, *United States* v. *Naftalin*, 441 U.S. 768, 774 (1979)—the inclusion of those words provides no sound basis for engrafting onto the first clause a requirement that does not appear there.

This Court's decision in *Aaron* v. *SEC*, 446 U.S. 680 (1980), reinforces the conclusion that Section 14(e) does not require scienter. In *Aaron*, the Court held that Section 17(a)(2) of the Securities Act, 15 U.S.C. 77q(a)(2), whose language is materially identical to Section 14(e)'s first clause, "is devoid of any suggestion whatsoever of a scienter requirement." *Aaron*, 446 U.S. at 696. Although Section 17(a)(1) requires scienter, as does the second clause of Section 14(e), the Court declined the parties' invitation "to adopt a uniform culpability requirement" for Section 17(a)'s subparagraphs. *Id.* at 697. The same analysis applies to Section 14(e)'s two distinct prohibitions. And while the Court has reached a different conclusion with respect to the similar text of Rule 10b-5, it did so because of limitations imposed by the statutory provision that Rule 10b-5 implements. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 212-214 (1976). Those limitations were inapplicable in *Aaron*, and they are similarly inapplicable here.

A negligence standard is consistent with the history and purposes of the Williams Act. Congress crafted that legislation primarily to ensure the disclosure of adequate information to shareholders who are confronted with cash tender offers. Negligent misrepresentations or omissions of material fact undercut the Williams Act's goal of disclosure, just as willful fraud does. Construing Section 14(e) to cover negligent misconduct

would also achieve Congress's goal of harmonizing the regulation of tender offers with the regulation of proxy solicitations under Section 14(a).

II. Although the court of appeals correctly held that Section 14(e) encompasses negligent misrepresentations, respondents' private suit nevertheless should be dismissed. In *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 42 n.28 (1977), this Court reserved the question whether Section 14(e) creates a private damages remedy for shareholders subject to a tender offer. This Court's modern jurisprudence on private rights of action, as summarized in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), precludes inferring such a right under Section 14(e). Under *Sandoval*, the "determinative" question is whether the statutory text "displays an intent to create not just a private right but also a private remedy." *Id.* at 286. Section 14(e) is "entirely silent as to private remedies." *Piper*, 430 U.S. at 24-25. That ends the analysis for statutory provisions that the Court has not previously construed to authorize private enforcement, "no matter how desirable that [private enforcement] might be as a policy matter." *Sandoval*, 532 U.S. at 287.

The absence of any private right of action under Section 14(e) provides a further reason to reject petitioners' view that the provision requires scienter. If the provision is not privately enforceable, securities defendants can no longer invoke the need to cabin private damages actions as a ground for engrafting an atextual scienter requirement. And because shareholders will be less able to curtail abuses relating to tender offers, the Court should decline to erect additional barriers to the Commission's enforcement of Section 14(e).

ARGUMENT

I. SECTION 14(e) PROHIBITS NEGLIGENT MISSTATEMENTS AND OMISSIONS OF MATERIAL FACT

The court of appeals correctly construed the substantive scope of Section 14(e) of the Exchange Act, 15 U.S.C. 78n(e). The first clause of that provision does not contain any requirement that a person act with scienter—"*i.e.*, intent to defraud, reckless disregard for the truth, or knowing use of some practice to defraud." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Section 14(e)'s text, history, and purpose make clear that the provision bans negligent misstatements and omissions of material fact, in addition to fraudulent activity.

A. The Plain Text Of Section 14(e)'s First Clause Does Not Require Scienter

This Court has repeatedly stressed that the statutory text "controls the definition of conduct covered by" the federal securities laws. *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 175 (1994); see *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 261 n.5 (2010). Thus, "the starting point" here, as "in every case involving construction of a statute[,] is the language itself." *Hochfelder*, 425 U.S. at 197 (brackets and citation omitted).

Section 14(e) makes it unlawful for any person, in connection with a tender offer, "to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, *or* to engage in any fraudulent, deceptive, or manipulative acts or prac-

tices." 15 U.S.C. 78n(e) (emphasis added). The italicized "or" connects two distinct clauses that proscribe separate categories of misconduct. The first clause prohibits "mak[ing] any" misstatement or omission of a material fact, while the second prohibits "fraudulent, deceptive, or manipulative acts or practices." *Ibid.* Under both the plain statutory text and this Court's precedents construing nearly identical language, the second clause requires scienter but the first clause does not.

1. The first clause of Section 14(e), like the nearly identical language in Section 17(a)(2) of the Securities Act, "is devoid of any suggestion whatsoever of a scienter requirement." *Aaron* v. *SEC*, 446 U.S. 680, 696 (1980). It does not expressly require a particular mens rea—for example, by making it unlawful to *intentionally or knowingly* make any untrue statement or omission of material fact. Cf., *e.g.*, 15 U.S.C. 78r(a) (limiting liability for certain misrepresentations where defendant "acted in good faith and had no knowledge"). Nor does it contain terms, such as "device," "scheme," "artifice," or "contrivance," that generally connote knowing or intentional deception. See *Aaron*, 446 U.S. at 696 & n.13; *Hochfelder*, 425 U.S. at 199. Rather, the first clause prohibits "any untrue statement of a material fact" or misleading omission in connection with a tender offer. 15 U.S.C. 78n(e). An "untrue" statement is simply a statement that is "false" or "[c]ontrary to fact." *The American Heritage Dictionary of the English Language* 1405 (1970). And "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)).

Section 14(e)'s second clause, by contrast, prohibits "any fraudulent, deceptive, or manipulative acts or practices, in connection with" a tender offer. 15 U.S.C. 78n(e). Although the clause does not specify the requisite mens rea, the terms "fraudulent," "deceptive," and "manipulative" typically refer to knowing or intentional misconduct. See *Aaron*, 446 U.S. at 696; *Hochfelder*, 425 U.S. at 199. Congress's "[u]se of the word 'manipulative' is especially significant" because that word is "virtually a term of art when used in connection with securities markets," and it "connotes intentional or willful conduct designed to deceive or defraud investors." *Hochfelder*, 425 U.S. at 199.

Petitioners suggest (Br. 26-29) that, because Section 14(e)'s second clause requires scienter, Section 14(e)'s first clause should be construed to impose the same requirement. The court below correctly rejected that argument, explaining that "[t]he use of the word 'or' separating the two clauses" evinces a congressional intent to proscribe "two different offenses." Pet. App. 8a; see *United States* v. *Woods*, 571 U.S. 31, 45-46 (2013) (Because the word "or" is generally a disjunctive term, "the words it connects are to be given separate meanings.") (citation and internal quotation marks omitted). Thus, as this Court explained with respect to Section 17(a), "the use of an infinitive" combined with "the use of the conjunction 'or'" demonstrates that "[e]ach succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." *United States* v. *Naftalin*, 441 U.S. 768, 774 (1979).

Petitioners' contrary argument rests in part (Br. 27-28) on the interpretive canon of *noscitur a sociis*, which "counsels that a word is given more precise content by the neighboring words with which it is associated."

Freeman v. *Quicken Loans, Inc.*, 566 U.S. 624, 634-635 (2012) (quoting *United States* v. *Williams*, 553 U.S. 285, 294 (2008)). But that canon is most instructive when it is applied to an ambiguous term that forms "part of a phrase" with other less ambiguous terms. *Id.* at 635; see, *e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1085-1086 (2015); *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575-576 (1995); see generally Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 196 (2012) ("For the associated-words canon to apply, the terms must be conjoined in such a way as to indicate that they have some quality in common."). For example, the terms "fraudulent" and "manipulative" in the second clause of Section 14(e) shed light on the meaning of the term "deceptive" in the same list. See *Hochfelder*, 425 U.S. at 198-199. But the *noscitur a sociis* canon does not justify importing a mens rea requirement from Section 14(e)'s second clause to "narrow the reach" of its first. *Naftalin*, 441 U.S. at 774; see *Aaron*, 446 U.S. at 697.

2. The Court in *Aaron* construed the materially identical language in Section 17(a)(2) as not requiring scienter. 446 U.S. at 695-696. The reasoning in *Aaron* controls here.

a. Section 17(a)(2) prohibits a seller of securities from "obtain[ing] money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 15 U.S.C. 77q(a)(2). That prohibition, which closely resembles Section 14(e)'s ban on material misstatements and omissions, immediately follows Section 17(a)(1)'s ban on

"employ[ing] any device, scheme, or artifice to defraud." 15 U.S.C. 77q(a)(1).

In *Aaron*, the Court considered whether proof of scienter is a necessary element of a Section 17(a) violation. 446 U.S. at 695. Observing that Section 17(a)(1) incorporates terms ("device, scheme or artifice to defraud") that are traditionally associated with "knowing or intentional practices," *id.* at 695-696 & nn.13-14, the Court held that Section 17(a)(1) requires scienter, *id.* at 695-697. "By contrast," the Court explained, "the language of § 17(a)(2), which prohibits any person from obtaining money or property 'by means of any untrue statement of a material fact or any omission to state a material fact,' is devoid of any suggestion whatsoever of a scienter requirement." *Id.* at 696. The Court concluded on that basis that Section 17(a)(2) does not require scienter. *Id.* at 697.

That reasoning controls the interpretive inquiry under Section 14(e). Just as petitioners urge (Br. 29-30, 37-39) that Section 14(e) be construed to require a uniform scienter requirement, the parties in *Aaron* "urged the Court to adopt a uniform culpability requirement" for Section 17(a). 446 U.S. at 697. The Court rejected that contention, explaining that "the language of the section is simply not amenable to such an interpretation." *Ibid.* The two clauses of Section 14(e) correspond in every meaningful way to the first two subsections of Section 17(a). Compare 15 U.S.C. 78n(e), with 15 U.S.C. 77q(a)(1)-(2).[1] And the Court has already discounted

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[1] The Court in *Aaron* cited a "well-known commentator" who had noted that "'there is nothing on the face of [Section 17(a)(2)] itself which smacks of *scienter* or intent to defraud.'" 446 U.S. at 696 (quoting 3 Louis Loss, *Securities Regulation* 1442 (2d ed. 1961))

the one potentially relevant textual distinction between Section 14(e) and Section 17(a)—that Section 17(a) uses numbered subsections while Section 14(e) does not. See *Naftalin*, 441 U.S. at 774 n.5 (noting that the separate numbering of Section 17(a) merely "reaffirm[s] conclusions drawn from the words themselves").[2]

b. Petitioners view (Br. 29-30, 37-38) Section 14(e) as analogous not to Section 17(a) but to Rule 10b-5, which this Court has held requires scienter. *Hochfelder*, 425 U.S. at 214. That argument is misconceived. Although Section 14(e) shares relevant text with Rule 10b-5, the specific justifications for construing that Rule to require scienter are inapplicable here.

The Court in *Hochfelder* addressed whether a showing of scienter, as opposed to mere negligence, was required to establish liability in a private action brought under Section 10(b) and Rule 10b-5. 425 U.S. at 187-188. The Commission had argued that the second subsection of Rule 10b-5, which bars material misstatements or omissions, 17 C.F.R. 240.10b-5(b), was "cast in

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(brackets omitted). After *Aaron* was decided, the same treatise explained that this Court's conclusions about Section 17(a) naturally extend to the near-verbatim language in Section 14(e). See 5 Louis Loss & Joel Seligman, *Securities Regulation* 2255 (3d ed. 1990) ("[T]he Supreme Court's construction of § 17(a) should govern so as to conclude that scienter * * * is required by the 'fraudulent' and 'deceptive' clause of § 14(e), which more or less tracks § 17(a)(1) of the 1933 Act and § 10(b) of the 1934 Act, but not by the untrue statement clause, which *precisely* tracks § 17(a)(2).").

[2] Unlike Section 14(e), Section 17(a)(2) also requires a showing that the violator "obtain[ed] money or property by means of" the misrepresentation or omission. 15 U.S.C. 77q(a)(2). But as the court of appeals correctly recognized, that feature of Section 17(a)(2) was not material to the Court's holding in *Aaron*. Pet. App. 12a n.4; see *Aaron*, 446 U.S. at 695-696.

language which—if standing alone—could encompass both intentional and negligent behavior." *Hochfelder*, 425 U.S. at 212. The Court rejected that interpretation, holding that Rule 10b-5 is limited to securities violations committed with scienter. See *id.* at 212-214.

The *Hochfelder* Court did not base that conclusion, however, on the text of Rule 10b-5 standing alone. To the contrary, the Court agreed with the Commission that "[v]iewed in isolation the language of subsection (b) * * * could be read as proscribing * * * any type of material misstatement or omission * * * whether the wrongdoing was intentional or not." 425 U.S. at 212. Yet the Court explained that "Rule 10b-5 was adopted pursuant to authority granted the Commission under § 10(b)," *id.* at 212-213, which makes it "unlawful for any person * * * [t]o use or employ, in connection with the purchase or sale of any security * * * [,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe," 15 U.S.C. 78j(b). That *statutory* text, in which the "words 'manipulative or deceptive'" appear "in conjunction with 'device or contrivance[,]' strongly suggest[ed] that Section 10(b) was intended to proscribe knowing or intentional" misconduct. *Hochfelder*, 425 U.S. at 197. The Court held that, because the scope of Rule 10b-5 could not "exceed the power granted the Commission by Congress under § 10(b)," the conclusion that the Rule required scienter "was compelled by" the textual limits on the statutory grant of authority. *Id.* at 214. No such constraint applies to the interpretation of Section 14(e). See *Aaron*, 446 U.S. at 696.

Petitioners emphasize (Br. 31-36) that the Court's decision in *Hochfelder* also turned on the absence of various procedural limitations on "the judicially created

private damages remedy under § 10(b)." 425 U.S. at 210. Without such limitations, the Court observed, implied private "actions premised on negligent wrongdoing" would "nullify the effectiveness of the carefully drawn procedural restrictions on" certain "express civil remedies in the 1933 Act allowing recovery for negligent conduct." *Id.* at 208, 210. As explained below, however, this Court's current approach to judicially created private rights of action forecloses the recognition of such a right under Section 14(e). See pp. 28-32, *infra*. Concerns about the potential disruptive effects of a negligence-based private damages action therefore should play no role in construing Section 14(e)'s substantive prohibition.

3. Section 14(e)'s second sentence underscores that scienter is not a necessary element of a claim based on material misstatements or omissions. That sentence states: "The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. 78n(e). Petitioners suggest (Br. 28 n.7) that Section 14(e)'s rulemaking delegation applies to both operative clauses in the first sentence, thereby indicating that both clauses are "focused on conduct that typically entails scienter." That argument is mistaken.

Congress has more generally authorized the Commission "to make such rules and regulations as may be necessary or appropriate to implement" the securities laws. 15 U.S.C. 78w(a). Congress has also vested the Commission with specific authority to prescribe appropriate rules relating to a recommendation to shareholders "to accept or reject a tender offer or request."

15 U.S.C. 78n(d)(4). The additional rulemaking authorization in Section 14(e) gives the Commission the further power to "define, and prescribe means *reasonably designed to prevent*," the "fraudulent, deceptive, or manipulative" acts that Section 14(e)'s second clause proscribes. 15 U.S.C. 78n(e) (emphasis added). Congress did not expect the Commission to flesh out the well-understood meaning of material misstatements and omissions, but rather to combat the more "sophisticated devices sometimes employed by both sides in contested tender offers." S. Rep. No. 1125, 91st Cong., 2d Sess. 6 (1970); see generally *United States* v. *O'Hagan*, 521 U.S. 642, 666-673 (1997). Consistent with that understanding, the Commission has exercised its additional authority under Section 14(e) by prohibiting a variety of potentially manipulative practices, as well as insider trading, in connection with tender offers.[3]

B. The History And Purpose Of The Williams Act Confirm That Section 14(e)'s First Clause Does Not Require Scienter

1. In enacting the Williams Act, "Congress sought to ensure that shareholders confronted by a cash tender offer for their stock [would] not be required to respond without adequate information." *O'Hagan*, 521 U.S. at 667 (citation and internal quotation marks omitted;

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[3] See *e.g.*, 17 C.F.R. 240.14e-1 (prohibiting unlawful tender-offer practices); 17 C.F.R. 240.14e-2 (requiring target to disclose its position in response to tender offer); 17 C.F.R. 240.14e-3 (prohibiting insider trading on tender offers); 17 C.F.R. 240.14e-4 (prohibiting transactions in connection with partial tender offers); 17 C.F.R. 240.14e-5 (prohibiting certain purchases outside of tender offer); 17 C.F.R. 240.14e-7 (prohibiting unlawful tender-offer practices in connection with "roll-up" transactions); 17 C.F.R. 240.14e-8 (prohibiting misconduct in connection with pre-commencement communications).

brackets in original). Section 14(e) "supplements the more precise disclosure provisions found elsewhere in the Williams Act." *Schreiber* v. *Burlington N., Inc.*, 472 U.S. 1, 10-11 (1985). Tender offerors and target companies are required to disclose material information about a tender offer, including the offer's terms, the offeror's dealings with the target company, the offeror's plans for the target company, and the offer's funding, see 15 U.S.C. 78n(d); 17 C.F.R. 240.14d-100; as well as the target company's proposed response, its recommendation to shareholders, and the reasons for that recommendation, see 15 U.S.C. 78n(d); 17 C.F.R. 240.14d-9, 240.14d-101, 240.14e-2. Section 14(e) "affirm[s] that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal." *Schreiber*, 472 U.S. at 11 (quoting House Report 11).

Whether willful or merely negligent, material misrepresentations or omissions undermine the Williams Act's "consistent emphasis on disclosure," *Schreiber*, 472 U.S. at 12, and deny the participants in a tender offer access to complete and accurate information, see *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 31 (1977) (explaining that "the legislation was designed solely to get needed information to the investor"). Even when distortion of information provided to shareholders results from negligence rather than from deliberate misconduct, such distortion undercuts Congress's "commit[ment] to a policy of neutrality in contests for control." *Id.* at 29.

2. The application of Section 14(e) to negligent misrepresentations or omissions also furthers the Williams

Act's purpose of harmonizing the regulation of tender offers with the regulation of proxy solicitations. Congress designed the Williams Act "[t]o remedy [a] gap in federal regulation" when corporate takeover attempts utilized cash tender offers rather than the proxy solicitations that were already regulated under Section 14(a). *Piper*, 430 U.S. at 22. The legislation was thus "patterned on the present law and the regulations which govern proxy contests" and provided "the same kind of disclosure requirements" that existed for proxies. 113 Cong. Rec. 24,665 (1967) (statement of Sen. Williams).

A negligence standard achieves that intended symmetry. Pursuant to its Section 14(a) authority, the Commission has promulgated Rule 14a-9, which prohibits material misstatements and misleading omissions in proxy statements using language nearly identical to the first clause of Section 14(e). See 17 C.F.R. 240.14a-9. In a number of decisions, including at least one issued before the Williams Act was enacted, lower courts have concluded—correctly, in the Commission's view—that scienter is not required to establish a violation of Rule 14a-9. See *Richland* v. *Crandall*, 262 F. Supp. 538, 552-553 & n.12 (S.D.N.Y. 1967); see also, *e.g.*, *Beck* v. *Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009); *Shidler* v. *All Am. Life & Fin. Corp.*, 775 F.2d 917, 926 (8th Cir. 1985); *Gould* v. *American-Hawaiian S.S. Co.*, 535 F.2d 761, 777 (3d Cir. 1976); *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1300-1301 (2d Cir. 1973) (Friendly, J.); cf. *Hochfelder*, 425 U.S. at 209 n.28 (observing that "some courts have concluded that proof of scienter is unnecessary" under Section 14(a)); but see *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 428 (6th Cir.) (applying scienter standard to outside account-

ants), cert. denied, 449 U.S. 1067 (1980). A determination that Section 14(e) covers negligent misstatements or omissions would thus harmonize the parallel prohibitions that apply to proxy solicitations and tender offers.

C. Negligence Is The Appropriate Floor For Liability Under Section 14(e)

Section 14(e)'s first clause prohibits "mak[ing] any untrue statement of a material fact or omit[ting] to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." 15 U.S.C. 78n(e). That language could literally be read to encompass, and thus to impose liability for, even non-negligent misstatements of fact. Despite that literal breadth of coverage, however, Section 14(e) should not be construed to impose strict liability.

Similar broad wording appears in Section 17(a) and Rule 14a-9. See 15 U.S.C. 77q(a); 17 C.F.R. 240.14a-9. Yet lower courts, like the court of appeals here, Pet. App. 8a, have long held that enforcement actions under these provisions must be predicated on *some* degree of culpability. See, *e.g.*, *SEC* v. *Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001) ("requir[ing] a showing of negligence" under Section 17(a)(2)); *Shidler*, 775 F.2d at 927 (requiring a showing of negligence under Rule 14a-9). And while the Court in *Aaron* did not explicitly state that Section 17(a) requires negligence, neither did it hint at strict liability. See, *e.g.*, 446 U.S. at 685 (recounting court of appeals' conclusion that "proof of negligence alone will suffice") (citation omitted); *id.* at 690 (explaining *Hochfelder*'s holding that "allegations of simple negligence" were insufficient under Section 10(b)); *id.* at 703 (Burger, C.J., concurring) (asserting

that, as a practical matter, "it will almost always be necessary for the Commission to demonstrate that the defendant's past sins have been the result of more than negligence"); *id.* at 715 (Blackmun, J., concurring in part and dissenting in part) (observing that, because of the different treatment of Section 10(b) and Section 17(a), "henceforth only the seller's negligent misrepresentations may be enjoined"); see also SEC Br. at 15, 18-20, 35, 38, 43, 67-69, 71-75, *Aaron*, *supra* (No. 79-66) (arguing that Section 17(a)(2) covers negligent misrepresentations).

Common-law principles support the prevailing assumption that material-misrepresentation provisions, including Section 14(e), require negligence. As a general matter, where Congress legislates in an area governed by the common law, this Court "favor[s] the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (citation omitted); cf. *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1330 (2015) (consulting "common law respecting the tort of misrepresentation" when construing provision of the Securities Act). At common law, negligence was required to establish tort liability if "a person supplie[d] false information to another with the intent to influence a transaction in which he has a pecuniary interest." *Gerstle*, 478 F.2d at 1300; see Restatement (Second) of Torts § 552(1) (1977) (explaining that a person may be liable for communicating false information about a transaction in which he has a pecuniary interest "if he fails to exercise reasonable care or competence in obtaining or communicating the information"). Although the federal securities laws do not uniformly track the

common law, see, *e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162 (2008), here the common law "reinforces" the widely held view that provisions proscribing material misstatements require at least negligence, *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

For two other reasons, imposition of strict liability under Section 14(e) would be anomalous. First, it is undisputed that Section 14(e)'s second clause requires scienter, cf. *Aaron*, 446 U.S. at 697, and scienter and strict liability would make unusual bedfellows in the same provision. Second, Section 14(e) sweeps broadly, literally encompassing any statement made by any person in connection with a tender offer—including, for example, a cable news commentator's discussion of such an offer. See 15 U.S.C. 78n(e). In that way, it differs from the strict-liability provisions in the federal securities laws, which require a narrow class of persons either to register with the Commission or to submit certain statements to the Commission. See, *e.g.*, 15 U.S.C. 77e (registration of securities offerings); 15 U.S.C. 78m(d) (statement of beneficial ownership); 15 U.S.C. 78*o* (registration of broker-dealers); 15 U.S.C. 78p(a)-(b) (statement of directors, officers, and beneficial owners); 15 U.S.C. 80b-3 (2012 & Supp. V 2017) (registration of investment advisors); cf. *Shidler*, 775 F.2d at 927 (describing strict liability as "too blunt a tool to ferret out the kind of deceptive practices Congress sought to prevent in enacting section 14(a)").

II. SECTION 14(e) DOES NOT CREATE A PRIVATE RIGHT OF ACTION

Although the court of appeals correctly held that Section 14(e) encompasses negligent misrepresenta-

tions, respondents' suit still should be dismissed. Under this Court's modern private-right-of-action jurisprudence, see *Alexander* v. *Sandoval*, 532 U.S. 275, 286-289 (2001), private litigants like respondents may not sue for violations of Section 14(e).

In *Piper*, 430 U.S. at 24-42, this Court held that Section 14(e) does not create an implied private right of action for unsuccessful tender offerors. The Court declined to address whether a private damages remedy exists for shareholders subject to a tender offer. See *id.* at 42 n.28. Nevertheless, lower courts have long permitted private litigants to pursue claims under Section 14(e), on the theory that this Court has recognized private rights of action under Section 10(b), *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971), and Section 14(a), *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 430-432 (1964). See, *e.g.*, *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 595-596 (5th Cir.), cert. denied, 419 U.S. 873 (1974); *Chris-Craft Indus., Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 361 (2d Cir.), cert. denied, 414 U.S. 910, and 414 U.S. 924 (1973).

In the courts below, petitioners did not dispute that Section 14(e) can be enforced through private suits. See Pet. App. 19a. Nevertheless, the question whether a private right of action exists under Section 14(e) is "fairly included" within the question on which this Court granted certiorari. Sup. Ct. R. 14.1(a); see Pet. i. And because many of petitioners' arguments for construing Section 14(e) to require scienter depend on the risks of overreaching that private enforcement of a negligence-based prohibition purportedly would entail, see Pet. Br. 31-42, the determination whether a private right exists is "predicate to an intelligent resolution of

the question" whether Section 14(e) encompasses negligent misrepresentations. *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996) (citation and internal quotation marks omitted).

A. This Court's Precedents Foreclose Inferring A Private Right Of Action Under Section 14(e)

1. The Commission has previously argued that this Court should infer a private right of action under Section 14(e). See SEC Amicus Br. at 8-18, 74-129, *Piper*, *supra* (No. 75-353). In making that argument, the Commission relied on the Court's then-operative interpretive principle that "it is not necessary to show [Congress's] intention to create a private cause of action" in the statute. *Id.* at 11, 90 (quoting *Cort* v. *Ash*, 422 U.S. 66, 82 (1975)) (emphasis omitted). "[A]s a routine matter," the Court at that time "would imply causes of action not explicit in the statutory text" when the Court deemed private enforcement "'necessary to make effective' a statute's purpose." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting *Borak*, 377 U.S. at 433). Thus, when the Commission filed its brief in *Piper*, the Court had already recognized an implied private right of action under Section 10(b), *Bankers Life*, 404 U.S. at 13 n.9, and Section 14(a), *Borak*, 377 U.S. at 430-432.

Beginning with *Piper*, however, where this Court rejected an implied private right of action for unsuccessful tender offerors, 430 U.S. at 24-42 & n.28, the Court has substantially altered its approach. It has declined to infer new causes of action unless the statute at issue demonstrates an intent to create both a right and a remedy. For example, the Court refused to infer a private right of action under Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a), because the statute "does not, by its

terms, purport to create a private cause of action in favor of anyone." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568-570 (1979). The Court likewise refused to infer a private right of action under Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-6, because that statute does not "mention an intended private action." *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-24 (1979) (citation omitted).

In a variety of contexts, the Court has since treated the absence of affirmative textual support as a bar to inferring new private rights of action. See *Johnson* v. *Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) (Kavanaugh, J.) (collecting cases). And in 2001, the Court acknowledged that it had "abandoned" its previous approach. *Sandoval*, 532 U.S. at 286-289. The Court now requires that, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Id.* at 286. In the absence of apparent "[s]tatutory intent" to create a cause of action, "courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-287. That remains true "even when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak*." *Id.* at 287.

2. The Court's current approach to private rights of action forecloses inferring such a right under Section 14(e).

a. Under this Court's current jurisprudence, the "determinative" question is whether the statute "displays an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286. That "analysis must begin with the language of the statute itself." *Touche Ross*, 442 U.S. at 568. The text of Section 14(e) does not "create or alter any civil liabilities,"

Transamerica, 444 U.S. at 19, but instead is "entirely silent as to private remedies," *Piper*, 430 U.S. at 24-25.

Section 14(e) also does not include any "'rights-creating' language," *Sandoval*, 532 U.S. at 288; see, *e.g.*, *Cannon* v. *University of Chi.*, 441 U.S. 677, 690 n.13 (1979), with respect to the "class of shareholder-offerees" that it ultimately "protect[s]," *Piper*, 430 U.S. at 38. Rather, it simply identifies the prohibited conduct and makes it "unlawful for any person" to engage in it. 15 U.S.C. 78n(e). "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Sandoval*, 532 U.S. at 289 (citation and internal quotation marks omitted); see, *e.g.*, *Transamerica*, 444 U.S. at 24; *Touche Ross*, 442 U.S. at 578.

b. The Court has identified two circumstances in which it will recognize an implied private right of action despite the absence of statutory language authorizing private suits. Neither of those circumstances is present here.

First, with respect to particular statutory provisions (including provisions of the federal securities laws) as to which the Court had previously recognized implied private rights of action, the Court has left its earlier decisions undisturbed. See *Central Bank*, 511 U.S. at 171 ("Private plaintiffs may sue * * * under private rights of action we have found to be implied by the terms of §§ 10(b) and 14(a) of the 1934 Act."); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 380 (1983) ("The existence of this implied remedy [under Section 10(b) and Rule 10b-5] is simply beyond peradventure."); see also *Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 142 (2011). The Commission has advocated for and continues to believe that such actions

serve as an important adjunct to government enforcement suits. But because this Court has not previously recognized a private right of action under Section 14(e), see *Piper*, 430 U.S. at 42 n.28, the same reasoning does not apply here.

Second, the Court has left open the possibility that it might infer a private right of action where Congress enacts "the verbatim statutory text that courts had previously interpreted to create a private right of action." *Sandoval*, 532 U.S. at 288. As discussed above, Section 14(e) adopts language nearly verbatim from Rule 10b-5 and, before that, from Section 17(a). See pp. 2-4, 6, *supra*. Because a private right of action exists under Rule 10b-5 but not under Section 17(a), Section 14(e) does not incorporate text that has been uniformly construed to create a private right of action. Compare *Bankers Life*, 404 U.S. at 13 n.9, with *Finkel* v. *Stratton Corp.*, 962 F.2d 169, 174-175 (2d Cir. 1992) (collecting Section 17(a) cases). And it is unclear what weight Rule 10b-5 deserves in any event, since Section 14(e) does not incorporate the actual "statutory text" of Section 10(b). *Sandoval*, 532 U.S. at 288.

3. Even if this Court construes Section 14(e) not to create a private right of action, some conduct that violates Section 14(e) may also violate *other* securities-law provisions that *are* privately enforceable. Some tender-offer participants could potentially recover damages in private suits under Section 10(b) and Rule 10b-5 if they have purchased or sold securities, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730-731 (1975), and if the defendant acted with scienter, see *Hochfelder*, 425 U.S. at 214. Tender offers involving an exchange of securities (rather than a cash payment)

may be regulated under the Securities Act, which provides a host of express private remedies. See 15 U.S.C. 11, 12, 15.[4] Under this Court's current interpretive methodology as reflected in *Sandoval*, however, private litigants would not have a cause of action to enforce Section 14(e) itself.

B. The Absence Of A Private Right Of Action Reinforces The Conclusion That Section 14(e) Does Not Require Scienter

1. Many of petitioners' arguments for imposing a scienter requirement (*e.g.*, Br. 31-36, 38-39) "assum[e] the existence of an inferred private right of action under Section 14(e)," *id.* at 23. Absent such a right, the need to add an atextual limitation on the substantive scope of Section 14(e) largely disappears. For example, it is not "significant" that the Williams Act lacks "procedural restrictions" that apply to express private suits "for negligent conduct," *Hochfelder*, 425 U.S. at 208-209; see Pet. Br. 32-34, since those restrictions do not apply to Commission enforcement actions. See, *e.g.*, 15 U.S.C. 77k(e). For the same reason, Section 14(e)'s negligence threshold does not encourage circumvention of the express private causes of actions defined elsewhere in the

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[4] Tender-offer participants who tender or acquire shares to or from a person who traded based on inside information would also have an express private right of action under Section 20A of the Exchange Act, 15 U.S.C. 78t-1. And private parties may be able to bring state-law claims with respect to tender offers, including for breaches of fiduciary duties, to the extent that those claims are not preempted by the Williams Act, see, *e.g.*, *CTS Corp.* v. *Dynamics Corp. of Am.*, 481 U.S. 69, 78-87 (1987), or precluded by the Securities Litigation Uniform Standards Act of 1998, see 15 U.S.C. 77p(d)(1)(B)(ii) (preserving state courts' jurisdiction over certain state-law claims involving tender offers).

securities laws. See Pet. Br. 34-36. Nor do the heightened pleading standards in the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101(b), 109 Stat. 746-749, weigh in favor of a scienter requirement, as those requirements also do not apply to the Commission. 15 U.S.C. 78u-4(b); see Pet. Br. 41-42.

2. The Commission investigates and brings enforcement actions against tender-offer participants for violations of Section 14(e), as well as for violations of other Williams Act disclosure provisions and implementing agency regulations, seeking relief that includes injunctions and civil monetary penalties. See 15 U.S.C. 78u (2012 & Supp. V 2017), 78aa; see also *O'Hagan*, 521 U.S. at 667 & n.14 (describing other disclosure provisions).[5] For the reasons stated above, a decision holding that Section 14(e) is not privately enforceable would accord with this Court's precedents. The absence of a private remedy, however, would increase the need for vigorous enforcement by the Commission. If Section 14(e) is enforceable only by the government, it would be particularly inappropriate to engraft an atextual scienter requirement onto that provision.

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[5] In some circumstances where the wrongdoer acts with scienter, conduct that violates Section 14(e) may also subject the offender to a Commission enforcement action under the antifraud provisions of Section 10(b) and Rule 10b-5. Cf. p. 18-19, 31, *supra*. A person who "willfully" violates the securities laws may also be subject to criminal prosecution by the Department of Justice, in which the potential penalties include fines and imprisonment. 15 U.S.C. 78ff(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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15 U.S.C. § 78n(e) (§ 3) ..... *passim*

Other Authorities

Cain, Matthew D., *et al.*, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603 (2018) 24–25, 25, 27

CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2017 M&A LITIGATION (2018) 23, 25

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Page(s)

Jeffries, Browning, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L. J. 55 (2014) 26

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members, and indirectly represents an underlying membership of more than

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel contributed money to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases that raise issues of concern to the nation's business community, including cases under the federal securities laws.

Business Roundtable is an association of chief executive officers of leading U.S. companies working to promote a thriving U.S. economy and expanded opportunity for all Americans. Business Roundtable members lead companies that together have more than $7 trillion in annual revenues, employ more than 15 million employees, invest nearly $150 billion in research and development, and pay nearly $300 billion in dividends to shareholders. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formation of public policy, and the organization regularly participates in litigation as *amicus curiae* when important business interests are at stake.

Both *amici* have a strong interest in this case because private securities class action litigation imposes a significant burden on their members and adversely affects their access to capital markets. In particular, their members frequently engage in mergers and acquisitions transactions. As a result, they face precisely the sorts of lawsuits that now invariably attend such transactions—including lawsuits brought in federal court under provisions of the federal securities laws, such as Section 14(e) of the Securities Exchange Act of 1934, the provision at issue here.

SUMMARY OF ARGUMENT

There was once a time when federal courts routinely engrafted damages remedies onto statutes that didn't have them, on the theory that doing so would make the laws more effective. But that era ended decades ago, in 1975, when this Court made congressional intent the touchstone for recognizing causes of action in federal statutes. *See Cort* v. *Ash*, 422 U.S. 66, 77–85 (1975). Ever since then, the Court has consistently declined to create rights of action under the securities laws. In 1977, the Court refused to recognize a private right of action in favor of defeated tender offerors under Section 14(e) of the Securities Exchange Act—the very provision at issue here. *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 24–42 (1977). And in a pair of decisions in 1979, the Court rejected rights of action under Section 17(a) of the Exchange Act and Section 206 of the Investment Advisers Act of 1940. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568–79 (1979); *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15–16 (1979). In one of those cases, the Court recognized that, under the abandoned, free-wheeling, pre-1975 approach to inferring private rights of action, "virtually every provision of the securities Acts" would have "an implied private cause of action." *Touche Ross*, 442 U.S. at 577. The Court understandably refused to accept that untenable result.

The correct approach today, of course, recognizes that Congress makes the laws. It requires judges to "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001) (citation omitted). Under that standard, *Touche Ross* and *Transamerica*

control here: Just like the provisions at issue in those cases, Section 14(e) contains no private right, not even the slightest hint that Congress ever imagined one. And it matters not that, before 1975, under the abrogated approach, the Court had recognized private rights under Sections 10(b) and 14(a) of the Exchange Act: "Not even when interpreting the ... Securities Exchange Act of 1934 ... have we applied [the former] method for discerning and defining causes of action. Having sworn off the habit of venturing beyond Congress's intent, we will not accept [an] invitation to have one last drink." *Id.* at 287 (citations omitted). There is no reason for the Court to depart from that course here.

In any event, as a practical matter, the costs of a Section 14(e) private right of action vastly outweigh the benefits. A review of Section 14(e) class-action litigation filed over the past twenty-three years shows what Section 14(e) has increasingly and largely become: a vehicle through which plaintiffs' lawyers extract attorneys' fees from corporate acquisitions involving tender offers, by bringing cursory litigation that benefits no one but themselves. At the same time, the elimination of Section 14(e) private litigation would not deprive investors of any substantial protection, because tendering shareholders could still pursue damages claims for fraud under Section 10(b) and Rule 10b–5. Finally, as the tortuous history of Section 10(b) and Rule 10b–5 illustrates, inferring a private right of action under Section 14(e) could once again require this Court repeatedly to guess what Congress's hypothetical intent would have been in defining the scope of a cause of action Congress never intended to create—an awkward, difficult, and ultimately futile endeavor, one that this Court wisely abandoned decades ago, and should refuse to revive here.

ARGUMENT

I. NO BASIS EXISTS FOR INFERRING A PRIVATE RIGHT OF ACTION UNDER SECTION 14(e).

Petitioners are correct that, if the Court infers a private right of action under Section 14(e), that right of action should require proof of scienter, and not mere negligence. Pet. Br. 22–42. But petitioners are also correct that, ultimately, the Court should infer no right of action under Section 14(e). *Id.* at 42–51.

And that more fundamental point is the ground upon which the Court should decide this case. Recognizing a private right of action under Section 14(e) would contravene over four decades of decisions of this Court holding that "[i]f the statute itself does not 'displa[y] an intent' to create 'a private remedy,' then 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1856 (2017) (quoting *Sandoval*, 532 U.S. at 286–87). Section 14(e)'s text contains no express right of action. And nothing in the statute otherwise reflects any congressional intent to create such a right. The Court should adhere to its precedents, follow Congress's intent, and hold that no private right of action under Section 14(e) exists.

A. Since 1975, this Court has made clear that private rights of action may not be inferred without an indication of congressional intent.

"In the mid-20th century, ... the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose," and so, "as a routine matter with respect to statutes,

the Court would imply causes of action not explicit in the statutory text itself." *Abbasi*, 137 S. Ct. at 1855 (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)). But the Court has taken far "more restrictive views on private rights of action in recent decades." *Unite Here Local 355* v. *Mulhall*, 571 U.S. 83, 85 (2013) (Breyer, J., dissenting from dismissal of writ of certiorari as improvidently granted). "The high-water mark for implied causes of action came in the period before [this] Court's 1975 decision in *Cort* v. *Ash*"—but ever since then, the "Court has been very hostile to implied causes of action." *Johnson* v. *Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) (Kavanaugh, J.); *see Cort* v. *Ash*, 422 U.S. at 77–85.

This hostility flows from the premise that "'a decision to create a private right of action is one better left to legislative judgment in the great majority of cases'"—a point that this Court has "'recently and repeatedly'" emphasized in numerous "precedents [that] cast doubt on the authority of courts to extend or create private causes of action." *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004)). Indeed, "when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis." *Abassi*, 137 S. Ct. at 1857. And because "[d]eciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law," "the right answer" as to who should do that "'most often will be Congress.'" *Jesner*, 138 S. Ct. at 1413 (Gorsuch, J., concurring in part and concurring in the judgment; quoting *Abassi*, 137 S. Ct. at 1857).

Accordingly, under the approach the Court has taken toward inferring rights of action for over four decades now, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286. "[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted, as [the Court's] recent decisions have made clear." *Transamerica*, 444 U.S. at 15–16. "Statutory intent on this latter point is determinative," for "[w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter." *Sandoval*, 532 U.S. at 286–87.

B. Congress gave no indication that it intended Section 14(e) to be privately enforced.

These principles apply with full force to the securities laws. And they fully pertain, in particular, to the Securities Exchange Act of 1934—despite this Court's recognition of private rights under Sections 14(a) and 10(b) of that Act during the "*ancien regime*" of permissive private-right creation that ended in 1975. *Sandoval*, 532 U.S. at 287. As the Court explained in *Sandoval*: "Not even when interpreting the same Securities Exchange Act of 1934 that was at issue in [*J.I. Case* v.] *Borak*" (which created a private right under Section 14(a)) "have we applied *Borak*'s method for discerning and defining causes of action. Having sworn off the habit of venturing beyond Congress's intent, we will not accept [an] invitation to have one last drink." 532 U.S. at 287 (citations omitted).

And in fact, ever since the demise of the *ancien regime*, the Court has roundly and repeatedly rebuffed such requests under the federal securities laws.

Addressing Section 14(e) specifically, the Court refused to infer a private right of action for damages under that provision in favor of defeated tender offerors. *Piper*, 430 U.S. at 24–42.[2] Considering Section 206 of the Investment Advisers Act of 1940, the Court refused to infer a private right of action for damages in favor of victims of frauds and breaches of fiduciary duties by investment advisors. *Transamerica*, 444 U.S. at 19–24. And in cases the Court cited as examples in *Sandoval*, the Court rejected a private right for damages under Section 17(a) of the Exchange Act, *Touche Ross*, 442 U.S. at 568–79, as well as a private right for damages under Section 10(b) of the Exchange Act for aiding and abetting fraud, *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170–78 (1994); *see Sandoval*, 532 U.S. at 287.

No more of a basis exists to find a private right of action here. As in the earlier cases, the judicial "task is limited solely to determining whether Congress intended to create the private right of action," so "analysis must begin with the language of the statute itself." *Touche Ross*, 442 U.S. at 568. And as the Court specifically said about Section 14(e) in *Piper*, that provision, on its face, "makes no provision whatever for a private cause of action." 430 U.S. at 24. Section 14(e) merely contains a prohibition—a prohibition against, among other things, making "untrue statement[s] of ... material fact," "omit[ting] to state ... material fact[s] necessary in order to make ... statements made ... not misleading," and "engag[ing] in any fraudulent, deceptive, or manipulative acts or

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[2] The Court expressly "limited" its holding to whether such offerors could sue, and "intimate[d] no view" on "[w]hether shareholder-offerees ... have an implied cause of action under § 14(e)." *Id.* at 42 n.28.

practices," all "in connection with any tender offer or request or invitation for tenders." 15 U.S.C. § 78n(e). Section 14(e) "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." *Transamerica*, 444 U.S. at 19. In short, Section 14(e) "does not, by its terms, purport to create a private cause of action in favor of anyone," *Touche Ross*, 442 U.S. at 569—and so it does not.

Beyond this, the fact that Section 14(e) proscribes fraudulent conduct and thereby "protect[s] [a] class of shareholder-offerees," *Piper*, 430 U.S. at 38, provides no basis for judicially inferring a right of action that Congress did not expressly create. The statute at issue in *Transamerica*, for example, similarly prohibits fraudulent conduct: It "broadly proscribes fraudulent practices by investment advisers, making it unlawful for any investment adviser 'to employ any device, scheme, or artifice to defraud ... [or] to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.'" 444 U.S. at 16 (quoting 15 U.S.C. § 80b–6). And by proscribing that fraudulent conduct, Section 206 protects a class of investor-victims: As the Court explained, "Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited." *Id.* at 24.

None of that mattered in *Transamerica*. "[T]he mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf." *Id.* So, too, in *Touche Ross*, where the Court observed: "the mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf." 442 U.S. at 578. The bottom line in both of

these cases furnishes the bottom line here: "The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end." *Transamerica*, 444 U.S. at 24.

The inquiry could end here for Section 14(e) as well. But more can, and should, be said—about the context and the structure of the Securities Exchange Act, and of the securities statutes generally. Those laws are chock-full of prohibitions of various sorts against fraud and deception and manipulation and misstatements and omissions and failures to comply with a myriad of regulations, and they contain a potpourri of proscriptions promulgated to protect investors. And apart from the provisions that explicitly create private rights to sue, nothing in those laws gives any more or less of an indication of a congressional intent to authorize private suits than does Section 14(e). Indeed, in *Touche Ross*, the Court clearly understood that inferring a right of action there would have meant "that virtually *every* provision of the securities Acts gives rise to an implied private cause of action"—an untenable, absurd result that the Court, quite understandably, "decline[d]" to accept. 442 U.S. at 577 (emphasis added). That logic applies to Section 14(e) as well.

At the same time, the express rights that Congress did authorize show how judicial creation of a private right under Section 14(e) would frustrate, and not further, Congress's intent. Today there are "eight express liability provisions contained in the 1933 and 1934 Acts," as amended over the years: Sections 11, 12, and 15 of the Securities Act of 1933, and Sections 9, 16, 18, 20, and 20A of the Securities Exchange Act of 1934. *Musick, Peeler & Garrett* v. *Emp'rs Ins. of Wausau*, 508 U.S. 286, 296 (1993); *see* 15 U.S.C.

§§ 77k, 77*l*, 77*o*, 78i, 78p, 78r, 78t, 78t–1. Each of these express rights very precisely defines who may sue, whom they may sue, what they may sue for, and under what circumstances they may sue. As this Court has repeatedly recognized, each of these "carefully drawn express civil remedies" contains "carefully drawn procedural restrictions" that "Congress regarded ... as significant." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195, 210 & n.30 (1976); *see also Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 384 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 380 (1982); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975).

These statutory cognates of precision instruments show how, "'[o]bviously, ... when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly'"—indeed, exactingly. *Transamerica*, 444 U.S. at 21 (quoting *Touche Ross*, 442 U.S. at 572). Congress didn't do so at all in Section 14(e), or, for that matter, anywhere in the Williams Act,[3] the 1968 law that added Section 14(e) to the Exchange Act. "The fact that [Congress] enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability on a private suitor." *Transamerica*, 444 U.S. at 21. For "it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Id.* at 20 (quoting *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 742 (1979) (Powell, J., dissenting)). The "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it," controls. *Id.* at 19.

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[3] Pub. L. No. 90–439, 82 Stat. 454 (1968).

That is especially so here, given the "significant," "carefully drawn procedural restrictions" Congress placed in the "express civil remedies" it has so "carefully drawn." *Ernst & Ernst*, 425 U.S. at 195, 210 & n.30. The judicial creation, or even the judicial extension, of a private right could easily disturb a policy balance that Congress strove to create.

And here, the balance that Congress apparently chose in enacting the Williams Act in 1968 was to let the SEC, and not private plaintiffs, do the job. In none of its provisions—not just Section 14(e)—does the statute mention any private right to sue. Likewise, the history of the Williams Act's drafting and passage contains no suggestion that any members of Congress believed that the legislation they were enacting would create any right to sue. *See, e.g.*, H.R. REP. NO. 90–1711, at 7–14 (1968); S. REP. NO. 90–550, at 7–11 (1967); *Piper*, 430 U.S. at 26–34 & n.20. To the contrary, the Senate report on the Williams Act refers explicitly and exclusively to *public* enforcement: "the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer." S. REP. NO. 90–550, at 4. Both the House and Senate reports repeatedly mention the regulatory powers of the Commission, as well as the "sanctions" that agency may impose—but say *not one word* about private suits. H.R. REP. NO. 90–1711, at 3; S. REP. NO. 90–550, at 3. Plainly that is because Congress contemplated that *no* private suits could be brought under any provision of the Williams Act, including Section 14(e).

"Like substantive federal law itself, private rights of action to enforce federal law must be created by

Congress." *Sandoval*, 532 U.S. at 286. Congress created no private right under Section 14(e).

C. The Court should follow its private-right jurisprudence—and Congress's intent.

In opposing certiorari, respondents offered four reasons why this Court should, just this once, suspend its now nearly half-century-old private-right jurisprudence—and defy congressional intent—by recognizing a private right under Section 14(e) in this case. *See* Br. in Opp. 28–29. None is persuasive.

For starters, respondents contended that petitioners waived the no-private-right argument below. Br. in Opp. 28. Not so. Petitioners' claim below, as it remains here, is that respondents' complaint did not make out a basis for relief under Section 14(e). Before the panel below, which was bound by Ninth Circuit precedent recognizing a Section 14(e) private right, petitioners argued that respondents' complaint was deficient because it failed to plead scienter. Before the *en banc* court of appeals, which can, of course, overrule its own precedent, petitioners made that same argument, but *also* argued there was no private right at all. *See* Pet. Br. 43 n.12. And at the petition stage in this Court, petitioners, joined by the Chamber, again made both arguments in support of their claim.

Petitioners were entitled to do precisely that. The scienter-is-required and no-private-right contentions are, at most, "separate *arguments* in support of a single claim," *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992)—petitioners' claim that the complaint pleads no judicially-created right to damages under Section 14(e). "And '[o]nce a federal claim is properly presented, a party can make any argument in support

of that claim; parties are not limited to the precise arguments they made below." *Citizens United* v. *FEC*, 558 U.S. 310, 330–31 (2010) (quoting *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation and internal quotation marks omitted)). But the two arguments are not that separate in any event. The threshold issue of whether a private right of action exists *in any circumstance* is "fairly included," S. CT. R. 14(a), within the question presented—whether "Section 14(e) ... supports an inferred private right of action based on a negligent misstatement or omission," Pet. i—because that question can't be answered without answering the first. Even if it hadn't been raised below, the no-private-right issue would still be properly before this Court.

And the Court should not decide this case by simply assuming the existence of a private right of action in this case, and then pronouncing an element of a hypothesized private right. Even doing that would undermine the Court's jurisprudence on private rights. Not only would it allow, if not encourage, the lower courts to continue to recognize private rights in the absence of supporting congressional intent—but it would also place this Court in the paradoxical position of defining an element of a right of action that its case law today makes clear shouldn't exist (and no doubt will someday say doesn't exist). It would amount to sipping the "one last drink" the Court eschewed in *Sandoval*, 532 U.S. at 287.

A second argument made by respondents was that the lower "courts have repeatedly confirmed that 'a private right of action may be inferred from Section 14(e).'" Br. in Opp. 29 (quoting *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 596 n.20 (5th Cir. 1974)). But the fact that lower courts have ignored this

Court's precedents for so long should not deter the Court from applying them here. In *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010), for example, the Court addressed a "disregard of the presumption against extraterritoriality" that "ha[d] been repeated over many decades by various Courts of Appeals in determining the application of the Exchange Act." The Court did not hesitate to correct that error, and in doing so, abrogated "the general approach that had been the law in the Second Circuit, and most of the rest of the country," for almost forty years—thus overturning, in just the Second Circuit alone, "dozens of cases" that had "refined [a] test over several decades." *Id.* at 274, 278 (Stevens, J., concurring in the judgment).

Even though the law applied in the lower courts changed substantially as a result, the Court's application of its precedents to correct that persistent lower-court error actually promoted stability and coherence in the law. Not only was the misapplication of Section 10(b) ended, but such a prominent abrogation of a substantial body of erroneous case law also had the secondary, yet salutary, effect of emphasizing the importance of the applicable legal principle—the presumption against extraterritoriality—in interpreting all federal statutes. The Court's decision also gave assurance that exceptions to its precedents will not be created through oversights or accidents of history in the lower courts. The fact that error below may be widespread and persistent counsels for correcting it—not countenancing it.

A third contention respondents trotted out at the petition stage was, quite remarkably, that "Section 14(e) contains exactly the same 'hints' that have supported [other] private rights under related securities laws for

decades"—namely, Section 14(a) and Section 10(b) of the Exchange Act. Br. in Opp. 28–29. But of course the Court's recognition of those implied rights took place during the *ancien regime* of free-spirited judicial private-right creation. Indeed, for Section 14(a), respondents actually rely on the Court's 1964 decision in *Borak*. Br. in Opp. 29. So enough said there. *See Sandoval*, 532 U.S. at 287 (condemning *Borak*). As for Section 10(b) and Rule 10b–5, this Court, in a one-sentence footnote in 1971, "simply explicitly acquiesced in [a] 25-year-old acceptance by the lower federal courts of an implied action under § 10(b)." *Touche Ross*, 442 U.S. at 577–78 n.19; *see Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971); *Kardon* v. *Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (first judicial decision inferring a 10(b)/10b–5 private right). But again, that acquiescence took place when *Borak*'s approach to judicial private-right creation remained the law.

In contrast, this Court has never recognized, or acquiesced in, any private right under Section 14(e).[4] To the contrary, in casting *Borak* aside, the Court "swor[e] off the habit of venturing beyond Congress's intent," *Sandoval*, 532 U.S. at 287, and swiftly made

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[4] *See Piper*, 430 U.S. at 24–42. Respondents assert that *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1 (1985), constitutes an "implicit recognition that Section 14(e) provides a private right of action." Br. in Opp. 29 n.18. Not true. Although the petitioner there was a private plaintiff, the Court nowhere mentioned the private-right issue, nowhere engaged in a private-rights analysis, and nowhere discussed its then-recent private-rights precedents, like *Cort*, *Touche Ross*, and *Transamerica*. The sole question the Court addressed and resolved was "whether misrepresentation or nondisclosure is a necessary element of a violation of § 14(e)," 472 U.S. at 2—a question pertinent to *any* Section 14(e) case, public or private.

clear that judges should not infer any more private rights of action under the federal securities laws, *see, e.g.*, *Touche Ross*, 442 U.S. at 568–79; *Transamerica*, 444 U.S. at 19–24; see pp. 5–10, above.

And even rights of action created by this Court under the *ancien regime*—like the Section 10(b) right—find themselves cabined by the Court's current approach: "Concerns with the judicial creation of a private cause of action caution against its expansion. ... *Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.*" *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) (emphasis added). Artifacts of a bygone era, the existing private rights under Sections 10(b) and 14(a) stand frozen in place, fixed by *stare decisis* and this Court's private-right jurisprudence. Again, in stark contrast, *no* decision of *this* Court has ever recognized a private right under Section 14(e)—while, on the other hand, the Court's extensive, still-applicable body of private-rights precedents firmly establishes that judges may *not* create one. Sections 10(b) and 14(a) thus provide no basis for creating a private right under Section 14(e).

A fourth and final argument that respondents advanced for avoiding the Court's private-rights jurisprudence is that Congress has somehow acquiesced in the lower courts' decisions recognizing a Section 14(e) private right. Invoking the Private Securities Litigation Reform Act of 1995 (the PSLRA) and the Securities Litigation Uniform Standards Act of 1998 (SLUSA), respondents assert that "Congress has repeatedly revamped core features of securities litigation" without overturning those lower-court decisions—and that, accordingly, Congress must have thought those decisions correct. Br. in Opp. 29.

That argument lacks all merit. Time and again, this Court has emphasized that "congressional inaction ... 'deserve[s] little weight in the interpretive process.'" *Sandoval*, 532 U.S. at 292 (quoting *Cent. Bank*, 511 U.S. at 187). "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation." *Cent. Bank*, 511 U.S. at 186 (citation and internal quotation marks omitted). But even apart from that commonplace canon, respondents' argument fails in light of what the PSLRA and SLUSA actually say and do. Far from ratifying any private right, the PSLRA *disclaims* doing so: Section 203 provides that *"[n]othing in this Act or the amendments made by this Act shall be deemed to create or ratify any implied private right of action ...."* Pub. L. No. 104–67, § 203, 109 Stat. 737, 762 (1995) (15 U.S.C. § 78j–1 note) (emphasis added). In other words, "Congress passed a law to tell us *not* to draw any inference from its inaction." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 300 (2014) (*"Halliburton II"*) (Thomas, J., concurring in the judgment).

And SLUSA hardly "revamped core features of securities litigation." Br. in Opp. 29. The statute narrowly addresses securities class actions brought under *state* law, or in *state* court; it "prohibits certain securities class actions based on *state* law," and "provides for the *removal* of certain [securities] class actions to federal court" from *state* court. *Cyan, Inc.* v. *Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1067 (2018) (emphasis added). Quite obviously, this procedural law's silence about Section 14(e) can't be taken as tacit approval of a substantive private right, and instead reflects how interpreting Section 14(e) had naught to do with Congress's aim of "enact[ing]

national standards for securities class action lawsuits involving nationally traded securities." Pub. L. No. 105–353, § 2, 112 Stat. 3227, 3227 (1998) (15 U.S.C. § 78a note).

In short, respondents have presented no basis for avoiding the clear authority that requires rejection of a private right under Section 14(e).

II. THE COSTS OF RECOGNIZING A SECTION 14(e) PRIVATE RIGHT VASTLY OUTWEIGH THE BENEFITS.

Apart from the fact that there is no statutory basis for a private right under Section 14(e), the costs of recognizing such a right significantly outweigh the benefits. In particular, an examination of Section 14(e) litigation over the past twenty-three years shows that the Section 14(e) private right has become little more than a costly vehicle for plaintiffs' attorneys to extract fees from corporate acquisitions involving tender offers. And refusing to recognize a Section 14(e) private right would avoid the burdens on the federal courts—especially this Court—of defining the elements of that private right without guidance from Congress.

A. Section 14(e) has become a vehicle for lawyer-driven litigation designed to extract attorneys' fees from corporate-control transactions involving tender offers.

In assessing the value of the Section 14(e) private right, it helps to see the uses to which plaintiffs and their counsel have put that right in recent years. And to see those uses, no better resource may be found than Stanford Law School's Securities Class Action Clearinghouse. That website consists of a searchable

public database that has collected information about securities class actions filed since January 1, 1996, ten days after the PSLRA became law.[5]

A review of the cases in the database shows that in recent years, the overwhelming majority of Section 14(e) class actions consist of cases that purport to seek injunctive relief against tender offers, but that are then promptly discontinued voluntarily—with no significant litigation activity. Sometimes a motion for a temporary restraining order or preliminary injunction is filed, but usually not; and when one is

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[5] The database's advanced search page may be found at http://securities.stanford.edu/advanced-search.html. There is a field for "Claims" in the middle of the page, and by selecting "1934 act claims – section 14e," and by clicking "Search" at the bottom, the user can obtain a list of every Section 14(e) class-action case in the database since 1996, along with links to pages containing docket information and links to complaints in those cases. The list can then be formatted in tabular form by clicking on the "Show in Filings Table" link toward the upper right.

Using the list generated by that search, counsel for *amici* collected and examined docket sheets for all, and complaints for nearly all, of the cases retrieved, which numbered 160 on the morning this brief was filed. This likely *understates* the number of cases filed, as multiple cases with similar allegations are often contemporaneously filed against similar sets of defendants; when that happens, database administrators count the similar cases as one—even "before the courts consolidate those lawsuits into a single proceeding." Stanford Law School Securities Class Action Clearinghouse, Methodology, Definition of a Single Filing or Record in the SCAC Database, http://securities.stanford.edu/about-the-scac.html#methodology.

The complaints reviewed by counsel are posted at http://bit.ly/14eCmplts; the dockets, at http://bit.ly/14eDckts. Counsel was unable to obtain complaints in three cases filed before 2000, but this made no difference to the discussion here, as docket sheets and court decisions made clear that "significant activity" (defined below, see p. 21 & n.7) had occurred in each.

filed, almost invariably it is quickly withdrawn, before any response is submitted.

The appendix to this brief contains a table prepared by *amici*'s counsel to illustrate the phenomenon. The table shows that, of the 155 Section 14(e) cases that could be categorized,[6] some ***116*** were injunctive-relief cases in which no "significant activity"[7] occurred. The table also shows how this kind of litigation is now being filed at an accelerating rate, and now constitutes around 90 percent or more of Section 14(e) litigation filed these days. Specifically, of the 116 no-significant-activity injunctive-relief Section 14(e) cases filed since 1996, some ***84*** were filed since the beginning of 2016—in just the last *three* years. (The overwhelming majority of these cases were brought by just five law firms.[8]) In contrast, only ***nine*** Section 14(e) cases since 2016 could be categorized as not fitting that description. Given the fact that multiple filings may have occurred

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[6] Of the 160 cases retrieved, two were erroneously classified in the database, and did not in fact involve Section 14(e) claims, leaving 158 actual Section 14(e) cases. Of those 158, three are too new to be categorized.

[7] The fourth column of the table categorizes each case as to whether it was an "Injunctive Relief Case Dismissed Without Significant Activity?" For this purpose, "significant activity" means that the defendants answered the complaint, or that the plaintiffs responded to a motion to dismiss, or that the court decided a motion for a preliminary injunction—a fairly lenient standard. Also excluded from the no-significant-activity category was a case in which the court found that shareholders had received an actual financial benefit from a settlement. See Appendix, p. 1a, 8a & nn.*, †.

[8] The firms were Rigrodsky & Long, P.A. (33 cases), WeissLaw LLP (17), Monteverde & Associates PC (14), Levi & Korsinsky, LLP (14), and Faruqi & Faruqi LLP (11). Only eight of the 84 cases did not involve these firms; thirteen involved two of them.

in many of these cases, see p. 20, n.5, above—and probably did, including in multiple jurisdictions—these totals are very likely *understated*.

What gives with this trend toward no-significant-litigation Section 14(e) litigation? It's part of a much larger phenomenon in recent years in corporate litigation—the growth in frivolous and abusive lawsuits attending the announcement of mergers and acquisitions. As the U.S. Chamber of Commerce's Institute for Legal Reform explained in 2012, before courts began taking steps to curb these suits:

> Here's how it works: Just about every merger or acquisition that involves a public company and is valued over $100 million—91% of all such transactions in 2010 and 2011—becomes the subject of multiple lawsuits within weeks of its announcement. Because the parties to the merger want to close their deal and begin to reap the economic benefits of the combination, the vast majority of these lawsuits settle quickly—within three months—and typically provide little or no benefit for shareholders. But the settlements do award large attorneys' fees to the lawyers who filed the lawsuits.

U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, THE TRIAL LAWYERS' NEW MERGER TAX 1 (2012) ("Merger Tax"), *available at* http://bit.ly/2qAaVUZ.

These sorts of settlements became known as "disclosure settlements." As the Chancellor of Delaware later explained, the "'disclosure settlement'" became "the most common method for quickly resolving stockholder lawsuits that are filed routinely in response to the announcement of virtually every transaction involving

the acquisition of a public corporation." *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 887 (Del. Ch. 2016). "In such lawsuits, plaintiffs' leverage is the threat of an injunction to prevent a transaction from closing." *Id.* at 892. And "the most common currency used to procure a settlement is the issuance of supplemental disclosures to the target[] [company's] stockholders before they are asked to vote on the proposed transaction," the idea being that "stockholders will be better informed." *Id.*

But the problem was that, in too many cases, "the additional information is not material, and indeed may be of only minor value." *Id.* at 892–93. As a result, explained the Chancellor,

> far too often such [disclosure-settlement] litigation serves no useful purpose for stockholders. Instead, it serves only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal and settling quickly on terms that yield no monetary compensation to the stockholders they represent.

Id. at 891–92.

Disclosure-settlement litigation became a growth industry over the past decade and a half. The number of such cases "quadrupled from 2005 to 2010." MERGER TAX, at 3 (emphasis omitted); *accord* Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 371 (2011). By 2010, 90 percent of mergers-and-acquisitions transactions faced this sort of litigation. CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2017 M&A LITIGATION 2 (2018)

("CORNERSTONE 2017 M&A LITIGATION REVIEW"), available at https://stanford.io/2QvQHa4.

And by the middle of this decade, Delaware's corporate-law court, the Court of Chancery, began expressing concern about disclosure settlements. *See, e.g.*, *In re Riverbed Tech., Inc. Stockholders Litig.*, No. 10484–VCG, 2015 WL 5458041, at *3–*6, (Del. Ch. Sept. 17, 2015) (approving settlement, but finding it "troubling"); *Acevedo* v. *Aeroflex Holding Corp.*, No. 9730–VCL, 2015 WL 4127547 (Del. Ch. July 8, 2015) (order rejecting settlement). In its *Trulia* decision in 2016, that court ultimately said enough was enough: No longer would it rubber-stamp disclosure settlements, given "the mounting evidence that supplemental disclosures rarely yield genuine benefits for stockholders." *Trulia*, 129 A.3d at 896. The Chancellor declared that the court would henceforth be "increasingly vigilant" in scrutinizing such settlements, and would "guard against potential abuses in [attorneys'] fee demands for mooted representative actions." *Id.* at 887, 898. Other courts—including the Seventh Circuit in addressing a settlement of state-law claims—have since followed *Trulia*. *See, e.g.*, *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016) (Posner, J.).

The Delaware Court of Chancery's crackdown on disclosure settlements prompted two strategic responses from the plaintiffs' bar—both of which are reflected in the Stanford search results. The first was to bring more claims in federal courts. Historically, the deal-disclosure cases mostly involved state breach-of-fiduciary duty claims, mostly in state courts—frequently claims under Delaware law brought in the Court of Chancery. *See, e.g.*, Matthew D. Cain, *et al.*, *The Shifting Tides of Merger Litigation*, 71 VAND. L.

REV. 603, 611, 621 (2018). But federal claims had also been part of the game. *See, e.g., id.* at 621. When transactions involve mergers requiring shareholder votes, and thus involve the solicitation of proxies, federal claims have been brought under Section 14(a). *See id.* at 611. And when the transactions involve tender offers, the claims have involved Section 14(e)—as the Stanford database search shows.

But after *Trulia* came down in 2016, plaintiffs' lawyers significantly increased their filings in federal court. By 2017, "the number of M&A deals litigated in federal court increased 20 percent, while state court filings declined." CORNERSTONE 2017 M&A LITIGATION REVIEW, at 4. Also by 2017, "74% of M&A deals over $100 million triggered federal securities suits, a 500% increase from 2009." U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, A RISING THREAT: THE NEW CLASS ACTION RACKET THAT HARMS INVESTORS AND THE ECONOMY 7 (2018) ("RISING THREAT"), *available at* http://bit.ly/ 2FlslPf. And again by 2017, 44 percent of all merger-related disclosure litigation was settled in federal courts. Cain, 71 VAND. L. REV. at 627. The massive upsurge in Section 14(e) litigation after 2015 reflected in the appendix to this brief also illustrates the trend.

Delaware's efforts to curb disclosure settlements had another effect that manifests itself in the Stanford search results—an increase in voluntary dismissals. There had always been voluntary dismissals in deal litigation, simply because of the fact that plaintiffs typically file multiple cases in multiple courts for each deal. "[N]o settlement will likely be approved unless all of the attorneys involved agree to it," and that "add[s] to the leverage that plaintiffs' attorneys"—in each of the suits—"have in forcing a quick settlement

in merger objection suits." Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L. J. 55, 80 (2014). Usually "[d]efendants prefer a global settlement" in a single forum that releases all claims, state and federal, relating to a transaction, and that requires that all plaintiffs' lawyers in all the cases must be "satisfied with the fee award." *Id* at 80 n.188. As part of the global settlement, the parties agree to have all parallel cases in all courts dismissed. Hence the voluntary, stipulated dismissals.

But as the appendix to this brief shows, such dismissals have skyrocketed lately—again, a byproduct of *Trulia*. As the Chamber has explained, in addition to their "federal court gambit," plaintiffs' lawyers "have been able to replicate their pre-*Trulia* practice of quick resolutions accompanied by payments of attorneys' fees." RISING THREAT, at 11. But now "the mechanism is slightly different." *Id.* Instead of offering settlements, plaintiffs' lawyers have been leveraging the nuisance value of weak federal claims into demands that defendants "unilaterally add new disclosures to address the supposed 'deficiencies' alleged in the class action complaint—which moots the claim—and pay a 'mootness fee' to the plaintiffs' lawyers in return for dismissal of the case." *Id.* "Typically, the payments are made without court approval." *Id.* at 12. And that's key for the plaintiffs' lawyers: "it avoids the risk that federal courts might follow Delaware's lead and reject both disclosure-only settlements and the associated fee awards," *id.*—as, in fact, the Seventh Circuit did in *Walgreen*, 832 F.3d at 725. Consistent with the Stanford Section 14(e) database search results, one scholarly article found that, in 2017, 89 percent of all deal cases were dismissed; 75 percent involved pay-

ment of mootness fees; and 100 percent of all mootness attorneys' fees were paid in federal courts. Cain, 71 VAND. L. REV. at 623, 627. The average mootness fee in 2017 was $265,000. *Id.* at 625.

What all this shows is that Section 14(e) has become, for the most part, a vehicle used not for making whole shareholders who are victims of fraud in tender offers, but a means by which plaintiffs' lawyers can secure a place at the bargaining table in extracting attorneys' fees in a farcical genre of "litigation" that benefits no one but themselves. Section 14(e) litigation mostly now amounts to a "'litigation tax'" on acquisitions involving tender offers—an "additional cost [that] may transform what would have been an economically sensible pro-consumer deal into a non-starter—depriving shareholders, workers, and the economy as a whole of the benefits that the deal would have produced." MERGER TAX, at 2. As "[f]or deals that go forward, the 'tax' diverts ... millions of dollars away from shareholders and workers and into the pockets of trial lawyers." *Id.*

The Court can take a significant step toward eliminating the economic burdens of such frivolous litigation simply by applying its private-rights jurisprudence to Section 14(e). And doing so would not deprive investors of the ability to bring *real* damages claims involving tender-offer fraud. That is because there will still be Section 10(b) and Rule 10b–5. Until the decision below came up with a negligence standard under Section 14(e), the courts inferring a Section 14(e) private right had held the elements of a claim "are essentially the same under § 14(e) as under Rule 10b–5," "except that § 14(e) applies to tender offers rather than the purchase or sale of securities." *Gulf & W. Indus., Inc.* v. *Great Atl. & Pac. Tea Co.*, 476 F.2d

687, 696 (2d Cir. 1973). Because a sale of shares into a tender offer plainly constitutes a sale and purchase of securities under Section 10(b), the private right of action under Section 10(b) and Rule 10b–5 provides a full damages remedy for claims of fraud by tendering shareholder-offerees.[9]

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[9] Some courts have suggested that *non*tendering shareholders may sue under Section 14(e) if they were deceived into holding their shares and *not* tendering. *See, e.g.*, *Stull* v. *Bayard*, 561 F.2d 429, 432 (2d Cir. 1977). But such claims ought to be barred by this Court's reasoning in *Blue Chip Stamps*, 421 U.S. at 731–55, which held that only actual purchasers and sellers could sue under Section 10(b). That holding is based not on statutory text, but rather on a concern that should equally apply to a Section 14(e) private right—that "vexatious litigation" would ensue if plaintiffs could assert fraud after they had "decided not to purchase or sell stock"—a claim not "capable of documentary verification." *Id.* at 740, 746.

In any event, claims by nontendering shareholders under Section 14(e) appear to be rare. As illustrated by a hypothetical in the Chamber's petition-stage *amicus* brief, such shareholders would not likely have damages. *See* U.S. Chamber Pet.-Stage Br. 14–15 n.2. The Stanford database search turned up only three such cases. Two were dismissed. *See Hohenstein* v. *Behringer Harvard REIT I, Inc.*, No. 3:12–cv–3772–G, 2014 WL 1265949, at *8–*9 (N.D. Tex. Mar. 27, 2014) (failure to plead scienter, material omission, and loss causation); *In re Piedmont Office Tr. Inc. Sec. Litig.*, No. 1:07–cv–2660–CAP, 2012 WL 12951737, at *4–*5 (N.D. Ga. Aug. 27, 2012) (failure to plead scienter). A third partially survived dismissal, but it appears that the Section 14(e) claim in that case has taken a backseat to a Section 10(b) claim by open-market *purchasers* who assert that corporate management inflated stock prices to keep shareholders from tendering into a hostile third-party offer. *See Roofer's Pension Fund* v. *Papa*, Civ. No. 2:16–cv–02805–MCA–LDW, 2018 WL 3601229, at *6–*24 (D.N.J. July 27, 2018); Am. Compl., *Roofers' Pension Fund* v. *Perrigo Co., PLC*, No. 2:16–cv–02085–MCA–LDW (D.N.J. June 21, 2017) (ECF No. 89), ¶¶ 273(a), 282–90. The hypothetical in the Chamber's petition-stage brief explains why such purchasers

In short, as recognized and utilized in the lower courts today, the Section 14(e) right of action does far more harm than good, harm that can be eliminated by a straightforward application of this Court's private-rights precedents.

B. Inferring a private right under Section 14(e) would burden courts with the impossible task of divining congressional intent as to elements of a right of action Congress did not intend to create.

There is still one additional cost to recognizing a private right under Section 14(e). And that is the substantial burden it would impose upon the federal courts, especially this one, in having to define its elements. As the tortuous, decades-long history of defining the private right under Section 10(b) and Rule 10b–5 makes clear, the judicial manufacture of a private right under the securities laws brings with it the need to answer a seemingly endless array of "questions about the elements of the [inferred] liability scheme"—questions that "ha[ve] posed difficulty," of course, "because Congress did not create [the inferred] cause of action and had no occasion to provide guidance about [its] elements." *Cent. Bank*, 511 U.S. at 172–73.

As one commentator put it in 2014, "the complexity of that task is reflected, in part, by the fact that there are at least twenty-eight Supreme Court opinions interpreting the scope of the section 10(b) right of action. Defining the elements of this cause of action and continuing to manage its evolution have consumed a non-trivial proportion of the Supreme Court's

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may have damages (and Section 10(b) claims) while the nontendering shareholders would not.

energy." Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 BUS. LAW. 307, 324–26 & n.85 (2014) (citing cases). Since that article was published, the Court has rendered one more decision interpreting the Section 10(b) private right,[10] making the total twenty-nine. Section 14(e) could likewise pose interpretive difficulties, of course, as it offers no more guidance about the elements of a private right than does Section 10(b). So, too, with any judicially created private right: It is inherently an "awkward task" to determine the standards "Congress intended courts to apply to a cause of action it really never knew existed." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 359 (1991).

No better illustration of the awkwardness of this task can be found than *this* case. In defining the scope of the private right it discovered, the Ninth Circuit hoisted high the banner of textualism: A Section 14(e) claim requires pleading and proof merely of negligence, the court below held, because Section 14(e) contains two main clauses, separated by the disjunctive "or"; and the "first clause"—"'to make any untrue statement of a material fact or omit to state any material fact'"—"is devoid of any suggestion that scienter is required." Pet. App. 8a, 16a; *accord* Br. in Opp. 15–16. So negligence, the court concluded, is what the text commands.

But that *can't* be what the text commands—*no matter how* Section 14(e) is parsed. The phrase "to make any untrue statement of a material fact or omit to state any material fact" no more connotes negligence than it does scienter. *Not a word* in that clause refers to, or even implicates, *any* state of mind. In fact,

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[10] *Halliburton II*, 573 U.S. 258.

the parties agree—the clause "'does not expressly require ... *any* specific state of mind.'" Pet. Reply 9 (quoting Br. in Opp. 15).

Yet not even the Ninth Circuit could fathom turning Section 14(e) into a strict-liability private right of action. And so—without *any* explanation of how a negligence standard could be grounded in the statutory text—the court below simply engrafted one onto Section 14(e) for purposes of the judicially-created private right of action. *See* Pet. App. 2a, 15a, 16a. The closest that court came to articulating a rationale for doing so was to say that Section 17(a)(2) of the 1933 Act "is largely identical to the first clause of Section 14(e)"—and that under *Aaron* v. *SEC*, 446 U.S. 680 (1980), Section 17(a)(2) "requires a showing of negligence." Pet. App. 13a. But this Court in *Aaron* held *no such thing*. *Aaron* did not involve an inferred private right of action. And although it held that scienter was not required, it did *not* say that negligence was the standard under Section 17(a)(2), and did not even use the word "negligence" or any of its cognates in the relevant discussion. 446 U.S. at 696. Simply put, there was no basis whatsoever for the Ninth Circuit to declare negligence, rather than scienter, the state-of-mind standard for purposes of an inferred private right under Section 14(e).

Which brings us back to the ultimate problem—and cost—in recognizing a private right of action here. While professing to discern the intent of Congress by carefully examining statutory text, the court below simply made up a state-of-mind standard for its made-up private right of action. But in a sense, the Ninth Circuit may be forgiven; it simply *had* to make it up. For having long ago manufactured a Section 14(e) private right, the court below had committed itself to

a paradoxical, nonsensical, and unavailing task—that of discerning what state-of-mind requirement Congress intended for a private right Congress never intended to exist—and therefore never addressed.

All this shows the wisdom of the course this Court took long ago, when it abandoned the fraught enterprise of creating rights of action not grounded in statutory text and Congress's will—and ever since, each time the Court has steadfastly refused an invitation to get back in the game. The invitation presented here, decades too late, the Court should decline once again.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

SECTION 14(e) CASES FROM STANFORD CLASS ACTION CLEARINGHOUSE DATABASE SEARCH (As of February 26, 2019)

	Filing Name/ Issuer	Filing Date	District Court	Injunctive Relief Case Dismissed Without Significant Activity?*	Notes
160	Loxo Oncology, Inc.	01/24/2019	D.Del.	Yes	Voluntarily dismissed.
159	TESARO, Inc.	01/04/2019	D.Del.	?	Too early to say. Ongoing.
158	iPass, Inc.	12/12/2018	N.D.Cal.	Yes	Voluntarily dismissed.
157	Intersections Inc.	12/11/2018	D.Del.	Yes	Voluntarily dismissed.
156	ConvergeOne Holdings, Inc.	12/03/2018	D.Del.	?	Too early to say. Ongoing.
155	Black Box Corp.	11/29/2018	D.Del.	?	Too early to say. Ongoing.
154	Datawatch Corp.	11/20/2018	D.Del.	Yes	Voluntarily dismissed.
153	JetPay Corp.	11/13/2018	D.Del.	Yes	Voluntarily dismissed.
152	Nevsun Res. Ltd.	11/09/2018	S.D.N.Y.	Yes	Voluntarily dismissed.
151	Corium Int'l, Inc.	10/29/2018	N.D.Cal.	Yes	Voluntarily dismissed.
150	CafePress Inc.	10/17/2018	D.Del.	Yes	Voluntarily dismissed.
149	Senomyx, Inc.	10/08/2018	D.Del.	Yes	Voluntarily dismissed.
148	Essendant Inc.	09/27/2018	D.Del.	Yes	Voluntarily dismissed.
147	Invuity, Inc.	09/26/2018	N.D.Cal.	Yes	Voluntarily dismissed.
146	Reis, Inc.	09/25/2018	S.D.N.Y.	Yes	Voluntarily dismissed.
145	Jamba, Inc.	08/23/2018	D.Del.	Yes	Voluntarily dismissed.
144	Xplore Tech. Corp.	07/27/2018	D.Del.	Yes	Voluntarily dismissed.
143	AbbVie Inc.	07/26/2018	N.D.Ill.	No	Damages claim by class of persons who transacted in AbbVie stock; parallel 10(b)/10b–5 claim. Ongoing.
142	Juniper Pharm., Inc.	07/26/2018	D.Mass.	Yes	Voluntarily dismissed.

* For purposes of this table, "significant activity" means, at the very least, the defendants' filing of an answer to a complaint, a plaintiffs' filing of an opposition to a motion to dismiss, a court's decision on a motion for a preliminary injunction, or, if none of these happened, a finding by the court (on a motion for attorneys' fees) that the litigation resulted in an improvement in the financial terms of a tender offer (see p. 8a & n.†, below).

141	Diamond Resorts Int'l, Inc.	07/23/2018	D.Nev.	No	Damages claim by class of tendering shareholders; parallel 10(b)/10b–5 claim. Ongoing.
140	Foundation Medicine, Inc.	07/10/2018	D.Mass.	Yes	Voluntarily dismissed.
139	RPX Corp.	06/04/2018	D.Del.	Yes	Voluntarily dismissed.
138	MTGE Inv. Corp.	05/25/2018	D.Md.	Yes	Voluntarily dismissed.
137	ARMO BioSciences, Inc.	05/24/2018	N.D.Cal.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
136	Mattersight Corp.	05/16/2018	D.Del.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
135	MuleSoft, Inc.	04/05/2018	N.D.Cal.	Yes	Voluntarily dismissed.
134	CSRA, Inc.	03/06/2018	D.Nev.	Yes	Voluntarily dismissed.
133	Crystal Rock Holdings, Inc.	03/05/2018	D.Conn.	Yes	Voluntarily dismissed.
132	Bioverativ Inc.	02/15/2018	D.Mass.	Yes	Voluntarily dismissed.
131	Key Tech. Inc.	02/15/2018	E.D. Wash.	Yes	Voluntarily dismissed.
130	Cascadian Therapeutics, Inc.	02/13/2018	D.Del.	Yes	Voluntarily dismissed; motion for mootness attorneys' fee terminated upon dismissal.
129	Juno Therapeutics, Inc.	02/13/2018	W.D.Wash.	Yes	Voluntarily dismissed.
128	Sucampo Pharma., Inc.	01/18/2018	D.Md.	Yes	Voluntarily dismissed after motion for TRO and preliminary injunction withdrawn.
127	Ignyta, Inc.	01/12/2018	S.D.Cal.	Yes	Voluntarily dismissed.
126	Amplify Snack Brands, Inc.	01/05/2018	W.D.Tex.	Yes	Voluntarily dismissed.
125	Repros Therapeutics Inc.	12/29/2017	S.D.Tex.	Yes	Voluntarily dismissed.
124	Time Inc.	12/18/2017	S.D.N.Y.	Yes	Voluntarily dismissed.
123	MGC Diagnostics Corp.	12/12/2017	D.Minn.	Yes	Voluntarily dismissed.
122	Inventure Foods Inc.	11/20/2017	D.Ariz.	Yes	Dismissed for failure to effect service of process on defendants within 90 days.
121	Planet Payment, Inc.	11/20/2017	E.D.N.Y.	Yes	Voluntarily dismissed.
120	Ocera Therapeutics, Inc.	11/17/2017	N.D.Cal.	Yes	Voluntarily dismissed. Motion for mootness attorneys' fee made after dismissal, but then withdrawn.
119	Onvia, Inc.	10/27/2017	W.D.Wash.	Yes	Voluntarily dismissed.

118	Exa Corp.	10/17/2017	D.Mass.	Yes	Voluntarily dismissed.
117	Dimension Therapeutics, Inc.	10/11/2017	D.Mass.	Yes	Voluntarily dismissed.
116	Landauer, Inc.	09/25/2017	D.Del.	Yes	Voluntarily dismissed.
115	MaxPoint Interactive, Inc.	09/14/2017	E.D.N.C.	Yes	Voluntarily dismissed.
114	Kite Pharma, Inc.	09/07/2017	C.D.Cal.	Yes	Voluntarily dismissed.
113	Supreme Indus., Inc.	08/29/2017	D.Del.	Yes	Voluntarily dismissed.
112	ShoreTel, Inc.	08/21/2017	N.D.Cal.	Yes	Voluntarily dismissed.
111	CDI Corp.	08/17/2017	E.D.Pa.	Yes	Voluntarily dismissed.
110	Guidance Software, Inc.	08/14/2017	C.D.Cal.	Yes	Voluntarily dismissed.
109	WebMD Health Corp.	08/09/2017	S.D.N.Y.	Yes	Voluntarily dismissed.
108	Rocket Fuel Inc.	08/04/2017	N.D.Cal.	Yes	Voluntarily dismissed.
107	MRV Commc'ns, Inc.	07/24/2017	C.D.Cal.	Yes	Voluntarily dismissed.
106	Spectranetics Corp.	07/21/2017	D.Colo.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
105	NCI, Inc.	07/19/2017	E.D.Va.	Yes	Voluntarily dismissed.
104	EnerNOC, Inc.	07/14/2017	D.Mass.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
103	Rightside Grp., Ltd.	06/30/2017	W.D.Wash.	Yes	Voluntarily dismissed.
102	Pershing Square Mgmt., L.P. (Allergan, Inc.)	06/28/2017	C.D.Cal.	No	Section 14(e)/Rule 14e–3 insider-trading damages claim on behalf of traders of options in and derivatives of Allergan stock; settled.
101	Patheon N.V.	06/19/2017	S.D.N.Y.	Yes	Voluntarily dismissed and preliminary injunction motion withdrawn.
100	CardConnect Corp.	06/13/2017	E.D.Pa.	Yes	Voluntarily dismissed.
99	Kate Spade & Co.	05/31/2017	S.D.N.Y.	Yes	Voluntarily dismissed.
98	Span-Am. Med. Sys., Inc.	05/25/2017	D.S.C.	Yes	Voluntarily dismissed after motion for TRO withdrawn.
97	Tangoe, Inc.	05/18/2017	D.Conn.	No	Damages claim on behalf of tendering shareholders; dismissed for failure to plead misstatement/omission, scienter, and loss causation.
96	Jive Software, Inc.	05/16/2017	N.D.Cal.	Yes	Voluntarily dismissed.
95	AdvancePierre Food Holdings, Inc.	05/12/2017	S.D.Ohio	Yes	Voluntarily dismissed.

94	RetailMeNot, Inc.	04/26/2017	D.Del.	Yes	Voluntarily dismissed.
93	Exar Corp.	04/18/2017	N.D.Cal.	Yes	Voluntarily dismissed. Parties' later agreement on mootness attorneys' fee noted on docket.
92	Air Methods Corp.	04/03/2017	D.Colo.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn. Parties' later agreement on mootness attorneys' fee noted on docket.
91	Nimble Storage, Inc.	03/21/2017	N.D.Cal.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
90	GigPeak, Inc.	03/08/2017	D.Del.	Yes	Voluntarily dismissed. Parties later stipulated to mootness attorneys' fee on the docket.
89	Popeyes La. Kitchen, Inc.	03/06/2017	D.Minn.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
88	Fresh Market, Inc.	03/02/2017	M.D.N.C.	No	Damages claim on behalf of tendering shareholders; voluntarily dismissed after filing of opening papers on motion to dismiss.
87	Cynosure, Inc.	03/01/2017	D.Del.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
86	Surgical Care Affiliates, Inc.	02/28/2017	D.Del.	Yes	Voluntarily dismissed.
85	Arctic Cat Inc.	02/08/2017	D.Minn.	Yes	Voluntarily dismissed.
84	CoLucid Pharma., Inc.	02/03/2017	D.Mass.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
83	Dermira Scis., Inc.	01/30/2017	D.N.J.	Yes	Voluntarily dismissed.
82	Ariad Pharma., Inc.	01/28/2017	D.Mass.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
81	Applied Micro Circuits Corp.	12/29/2016	N.D.Cal.	Yes	Voluntarily dismissed after motion for TRO and preliminary injunction withdrawn.
80	TubeMogul, Inc.	12/06/2016	N.D.Cal.	Yes	Voluntarily dismissed.
79	Monster Worldwide Inc.	09/09/2016	D.Mass.	Yes	Voluntarily dismissed.
78	Medivation, Inc	09/07/2016	N.D.Cal.	Yes	Voluntarily dismissed.
77	NetSuite, Inc.	08/30/2016	N.D.Cal.	Yes	Voluntarily dismissed.
76	Sequenom, Inc.	08/15/2016	S.D.Cal.	No	Claims by tendering shareholders; motion to dismiss pending. Ongoing.

75	Outerwall, Inc.	08/12/2016	W.D.Wash.	No	Damages claim on behalf of tendering shareholders; voluntarily dismissed after motion to dismiss was briefed.
74	Relypsa, Inc.	08/12/2016	N.D.Cal.	Yes	Voluntarily dismissed after motion for preliminary injunction withdrawn.
73	Sagent Pharma., Inc.	08/09/2016	N.D.Ill.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
72	Heartware Int'l, Inc.	08/08/2016	D.Mass.	Yes	Dismissal via disclosure settlement with attorneys' fee after motion for TRO and preliminary injunction withdrawn.
71	QLogic Corp.	07/22/2016	C.D.Cal.	Yes	Voluntarily dismissed.
70	Skullcandy, Inc.	07/19/2016	D.Utah	Yes	Voluntarily dismissed after motion for TRO and preliminary injunction withdrawn. Motion for mootness attorneys' fee denied.
69	Ceres, Inc.	07/15/2016	C.D.Cal.	Yes	Dismissed for failure to prosecute.
68	Perrigo Co. plc	05/18/2016	D.N.J.	No	Damages claim by nontendering shareholders; parallel 10(b)/10b–5 open market purchaser claim; ongoing.
67	Hatteras Fin. Corp.	05/11/2016	M.D.N.C.	Yes	Dismissal via disclosure settlement with attorneys' fee after preliminary injunction motion withdrawn.
66	Ruckus Wireless, Inc.	05/11/2016	N.D.Cal.	No	Damages claim by tendering shareholders; dismissed for failure to plead misstatement/omission and scienter.
65	Fresh Market, Inc.	04/07/2016	D.Del.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
64	Zulily, Inc.	09/03/2015	W.D.Wash.	Yes	Dismissal via disclosure settlement with attorneys' fee.
63	Emulex Corp.	04/08/2015	C.D.Cal.	No	Damages claim by tendering shareholders; dismissed for failure to plead scienter; reversed; cert. granted; ongoing.
62	Valeant Pharma. Int'l, Inc. (Allergan, Inc.)	05/30/2014	C.D.Cal.	No	Section 14(e)/Rule 14e–3 insider-trading damages claims on behalf of sellers of Allergan stock; settled.
61	Chelsea Therapeutics Int'l Ltd.	05/30/2014	D.Del.	No	Damages claim by tendering shareholders; voluntarily dismissed after filing of opening brief on motion to dismiss.

60	Gentium S.p.A. ADS	01/15/2014	S.D.N.Y.	No	Damages claim by tendering shareholders; dismissed for failure to plead misstatement/omission and scienter.
59	Tellabs, Inc.	11/05/2013	N.D.Ill.	Yes	Dismissal via disclosure settlement with attorneys' fee.
58	Behringer Harvard REIT I, Inc.	09/17/2012	N.D.Tex.	No	Damages claim by nontendering shareholders; dismissed for failure to plead misstatement/omission, scienter, and loss causation.
57	BrightPoint, Inc.	07/24/2012	S.D.Ind.	N/A	Erroneously classified in database as a 14(e) case; complaint asserts 14(a) claims.
56	SRI Surgical Express Inc.	06/22/2012	M.D.Fla.	No	Claim for injunctive relief; dismissed as moot on motion to dismiss.
55	Cost Plus, Inc.	05/25/2012	N.D.Cal.	No	Motion for preliminary injunction denied; later dismissed via disclosure settlement with attorneys' fee.
54	ATS Corp. (Salient Federal)	03/06/2012	E.D.Va.	Yes	Stayed; voluntarily dismissed.
53	Micromet, Inc.	02/08/2012	D.Md.	Yes	Stayed; voluntarily dismissed.
52	Xcelera Inc.	02/06/2012	D.Conn.	No	Claims by tendering shareholders; parallel 10(b)/10b–5 claims; 14(e) claims dropped in amended complaint.
51	SuccessFactors, Inc.	01/05/2012	N.D.Cal.	Yes	Voluntarily dismissed.
50	Adolor Corp.	11/10/2011	E.D.Pa.	Yes	Stayed; voluntarily dismissed.
49	Petrohawk Energy Corp.	08/02/2011	S.D.Tex.	Yes	Voluntarily dismissed.
48	China Sec. & Surveillance Tech. Inc.	07/21/2011	D.Del.	Yes	Voluntarily dismissed.
47	Cal. Pizza Kitchen, Inc.	06/24/2011	C.D.Cal.	Yes	Voluntarily dismissed.
46	Orthovita, Inc.	06/01/2011	E.D.Pa.	Yes	Dismissal via disclosure settlement with attorneys' fee.
45	Impac Mortg. Holdings, Inc.	05/10/2011	C.D.Cal.	No	Damages claim by tendering shareholders; parallel 10(b)/10b–5 claim; voluntarily dismissed.
44	Orchid Cellmark Inc.	05/02/2011	D.N.J.	Yes	Voluntarily dismissed after filing of opening papers on motion for preliminary injunction and motion to dismiss.
43	Celera Corp. (Quest Diagnostics)	04/11/2011	N.D.Cal.	Yes	Voluntarily dismissed.

42	Beckman Coulter, Inc.	02/25/2011	C.D.Cal.	Yes	Dismissed for failure to prosecute.
41	Atheros Communications, Inc.	02/10/2011	N.D.Cal.	No	Original complaint contained injunctive 14(e) claim; dropped in amended complaint.
40	Lasercard Corp.	01/18/2011	N.D.Cal.	Yes	Voluntarily dismissed.
39	Genzyme Corp. (Sanofi-Aventis)	10/18/2010	D.Mass.	Yes	Voluntarily dismissed; later motion for mootness attorneys' fee denied.
38	Potash Corp. of Sask. Inc.	10/06/2010	N.D.Ill.	Yes	Voluntarily dismissed.
37	BlueLinx Holdings Inc.	09/30/2010	N.D.Ga.	Yes	Parties stipulated to mootness; court denied motion for mootness attorneys' fees and dismissed case.
36	Cogent Inc.	09/16/2010	C.D.Cal.	Yes	Voluntarily dismissed.
35	ICx Techs., Inc.	09/09/2010	E.D.Va.	Yes	Dismissal via disclosure settlement with attorneys' fee.
34	Penwest Pharma. Co.	08/26/2010	S.D.N.Y.	Yes	Voluntarily dismissed.
33	Superior Well Servs., Inc.	08/25/2010	W.D.Pa.	Yes	Voluntarily dismissed after preliminary injunction motion withdrawn.
32	ADC Telecomms., Inc.	07/28/2010	D.Minn.	Yes	Voluntarily dismissed.
31	Emmis Commc'ns Corp.	06/18/2010	S.D.Ind.	Yes	Voluntarily dismissed
30	Sembcorp Utils. Pte Ltd (Cascal N.V.)	06/07/2010	S.D.N.Y.	No	Damages claim by tendering shareholders; later voluntarily dismissed and motion for attorneys' fees denied.
29	Chordiant Software, Inc.	04/12/2010	N.D.Cal.	Yes	Voluntarily stayed; case later closed by court after no activity.
28	Novartis AG (Alcon, Inc)	01/11/2010	E.D.N.Y.	Yes	Voluntarily dismissed.
27	Trimeris, Inc.	10/21/2009	M.D.N.C.	Yes	Voluntarily dismissed.
26	Medarex, Inc.	07/31/2009	D.N.J.	Yes	Voluntarily dismissed.
25	Cox Radio, Inc.	04/08/2009	N.D.Ga.	Yes	Voluntarily stayed; terminated by the court.
24	Roche Holding, Ltd (Genentech)	02/23/2009	N.D.Cal.	Yes	Voluntarily stayed; then voluntarily dismissed.
23	Thornburg Mortg., Inc.	10/27/2008	D.N.M.	Yes	Voluntarily dismissed.

22	Citigroup Alternative Invs. LLC (Falcon Strategies)	05/20/2008	S.D.N.Y.	No	Voluntarily dismissed after motion for preliminary injunction denied.
21	Piedmont Office Realty Trust (f/k/a Wells Real Estate Inv. Trust)	10/25/2007	N.D.Ga.	No	Claims by nontendering shareholders; dismissed for failure to plead scienter; settled on appeal.
20	Converium Holding AG	05/01/2007	S.D.N.Y.	No[†]	Settled with payment of attorneys' fees after change in economic terms of tender offer.
19	WatchGuard Techs., Inc.	12/06/2006	W.D.Wash.	No	Damages claim by tendering shareholders; claim later dropped in amended complaint.
18	Erie Family Life Ins. Co.	06/01/2006	W.D.Pa.	No	Damages claim by tendering shareholders; later settled.
17	Capitol Bancorp	11/23/2005	N.D.Cal.	No	Damages claim by tendering shareholders; dismissed for failure to plead misstatement/omission and scienter; affirmed.
16	TXU Corp.	09/06/2005	N.D.Tex.	No	Damages claim by tendering shareholders; dismissed for failure to plead scienter; affirmed.
15	Fox Entm't Grp., Inc. (News Corp.)	02/08/2005	S.D.N.Y.	Yes	Voluntarily dismissed.
14	New York Cmty. Bancorp	09/24/2004	E.D.N.Y.	No	Damages claim by tendering shareholders; dismissed for failure to plead misstatement/omission.
13	Exxon Mobil Corp.	03/17/2004	D.N.J.	No	Damages claim by tendering shareholders; 14(e) claim later dropped and 10(b)/10b–5 claim added.
12	Starwood Hotels & Resorts Worldwide, Inc. (Westin Hotels)	11/18/2003	S.D.N.Y.	Yes	Voluntarily dismissed; motion for mootness attorneys' fees denied.
11	Digital Island, Inc.	01/22/2002	D.Del.	No	Damages claim by tendering shareholders; dismissed for failure to plead misstatements/omissions; affirmed.

[†] Even though little actual litigation activity occurred in this case, it is excluded from the "Yes" category, because the district court found that change in tender offer terms was significant and financially beneficial to stockholders, and the settlement in this case was thus not merely a "disclosure settlement."

10	Lincoln Co. LLC (Hartmarx Corp.)	10/10/2001	N.D.Ill.	No	Damages claims by open-market purchasers of Hartmarx stock who claimed harm from failed tender offer; parallel 10(b)/10b–5 claims; ultimately settled.
9	Spanlink Commc'ns, Inc.	04/13/2000	D.Minn.	No	Damages claims by tendering shareholders; ultimately settled.
8	Amway Asia Pac. Ltd.	12/16/1999	S.D.N.Y.	No	Damages claims by tendering shareholders; parallel 10(b)/10b–5 claims; dismissed for failure to plead misstatement/omission and reliance; affirmed.
7	United Techs. Corp.	07/27/1999	M.D.Tenn.	No	Damages claim alleging violation of Rule 14d–10; unclear if there was 14(e) claim; defendants' motion for summary judgment granted. (Complaint unavailable.)
6	Gabelli Grp. Cap. Partners (Gabelli Equity Trust, Inc.)	03/10/1998	S.D.N.Y.	No	Motion to dismiss argued and then denied as moot; mootness fee application settled and case voluntarily dismissed. (Complaint unavailable.)
5	Am. Bankers Ins. Grp., Inc.	01/28/1998	S.D.Fla.	No	After answer to complaint and class certification motion filed, case voluntarily dismissed as moot with payment of mootness attorneys' fee.
4	Gabelli Grp. Cap. Partners (Gabelli Global Multimedia)	08/28/1997	S.D.N.Y.	N/A	Erroneously classified in database as a 14(e) case; complaint asserts 14(a) claims.
3	FHP Int'l Corp.	04/02/1997	C.D.Cal.	No	Damages claims on behalf of tendering shareholders; motion to dismiss granted; appeal dismissed.
2	Hallwood Energy Corp.	11/15/1996	D.Colo.	No	Damages claims on behalf of tendering shareholders; settled after motion to dismiss was briefed.
1	BHP Copper, Inc. (Magna Copper Co.)	06/13/1996	D.Ariz.	No	Damages claims on behalf of tendering shareholders; 14(e) claim dismissed because there was no tender offer. (Complaint unavailable.)

No. 18-459

IN THE

Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FORMER COMMISSIONERS OF THE SECURITIES AND EXCHANGE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Amanda M. Rose, *Designing an Efficient Securities Fraud Deterrence Regime*, The Heritage Foundation (Feb. 28, 2017), https://www.heritage.org/markets-and-finance/report/designing-efficient-securities-fraud-deterrence-regime 8

Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 Penn. L. Rev. 2173 (2010) 7, 8, 10, 11

Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 Colum. L. Rev. 1301 (2008) 9, 14

INTEREST OF *AMICI CURIAE*[1]

Amici are former Commissioners of the Securities and Exchange Commission ("SEC"). Both in that role and outside of that role through writing, teaching, or otherwise, they have devoted substantial time and effort to the optimal operation of the nation's securities laws. *Amici* file this brief because they believe that the decision below, if allowed to stand, will cause substantial disruption to and distortion of the nation's securities markets.

Charles C. Cox served as Commissioner of the SEC from 1983 until 1989. He currently is an Executive Vice President at Compass Lexecon.

Daniel M. Gallagher served as Commissioner of the SEC from 2011 until 2015. He currently is the Chief Legal Officer of Mylan N.V.

Joseph A. Grundfest served as Commissioner of the SEC from 1985 until 1990. He currently is the William A. Franke Professor of Law and Business at Stanford Law School.

SUMMARY OF THE ARGUMENT

By implying a private right of action under Section 14(e) of the Securities Exchange Act of 1934 *and* making liability under that provision as expansive as possible short of strict liability, the decision below opens the floodgates to doubly vexatious litigation unmoored from the statutory text and purpose. First,

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to fund the preparation or submission of this brief.

the Ninth Circuit's decision exposes corporations to private liability under Section 14(e) by finding an implied private right of action in the absence of even a hint that Congress intended that the statute be privately enforceable. In creating a new private right of action under the securities laws, the Ninth Circuit ventured where this Court has not gone in four decades. Second, the Ninth Circuit doubled down on its conspicuous departure from the text and intent of Section 14(e) by holding that mere negligence suffices to impose substantial liability for violations of that provision.

The result of the Ninth Circuit's freewheeling interpretive approach is a legal framework that portends suits in connection with virtually every merger. And corporations will face irresistible pressure to settle them, no matter how frivolous, in light of the permissiveness of a hindsight-driven negligence standard. For this reason, private enforcement of Section 14(e) under a negligence standard threatens to thwart socially beneficial mergers and cause unnecessary disruption of the mergers that are consummated despite the dangers.

Amici believe that the SEC is best equipped to enforce Section 14(e) consistent with the objectives of Congress's carefully calibrated securities regime. Conferring sole enforcement authority on the SEC hews to the statutory text and intent. It also ensures that the agency charged with protecting investors, maintaining fair and efficient markets, and facilitating capital formation can strike the right balance combating the ills of securities fraud without overdeterring beneficial economic activities. SEC enforcement of Section 14(e), without the specter of

private suits working at cross-purposes, maximizes the efficiency of the nation's securities markets.

But even if the Court does not reach the question whether Section 14(e) creates an implied private right of action, reversal still is warranted to make clear that scienter, not simple negligence, is the proper fault standard under that provision. As far as *amici* are aware, the Court has not adopted a negligence standard for an implied private right of action since at least 1975. The Court should not break new ground here. Reading a negligence standard into Section 14(e), as the Ninth Circuit did, only amplifies the harms worked by private actions under the statute and marks an even more pronounced departure from Congress's intent.

ARGUMENT

I. THE COURT SHOULD HOLD THAT THERE IS NO IMPLIED PRIVATE RIGHT OF ACTION UNDER SECTION 14(e).

This Court never has decided, in the first instance, whether shareholders have an implied private right of action under Section 14(e). *See, e.g., Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 42 n.28 (1977) (reserving question "[w]hether shareholder-offerees . . . have an implied cause of action under s 14(e)"). It should take this opportunity to hold that there is not.

A. Section 14(e) Displays No Intent to Create a Private Remedy.

As the Court recently reaffirmed, "a private right of action under federal law is not created by mere

implication, but must be 'unambiguously conferred.'" *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387–88 (2015); *see also, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (explaining that if Congress seeks to "create new rights enforceable under an implied private right of action," then "it must do so in clear and unambiguous terms").[2] "[W]hen deciding whether to recognize an implied cause of action, the 'determinative' question is one of statutory intent." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). "[T]hat a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Rather, "[i]f the statute itself does not 'displa[y] an intent' to create 'a private remedy,' then 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Abbasi*, 137 S. Ct. at 1856 (second alteration in original); *see also id.* (stressing that the "judicial task" is "'limited solely to determining whether Congress intended to create the private right of action asserted'"). "'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

The Court's caution when determining whether a statute creates an implied private right of action—and its narrow focus on statutory text and intent—stands as a marked rejection of a previous era during which the Court "assumed it to be a proper judicial

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[2] All citations and footnotes are omitted, and all alterations are in the original unless otherwise indicated.

function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Abbasi*, 137 S. Ct. at 1855. The Court "abandoned that understanding" in 1975 "and ha[s] not returned to it since." *Sandoval*, 532 U.S. at 287; *see also id.* ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."). Notably, consistent with its increasing skepticism about creating private causes of action by implication, the Court has not found a new implied private right of action under the securities laws since its decision in *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979).

Applying the governing standard here, it is clear that Section 14(e) does not create an implied private right of action. Nothing in the "statute itself . . . 'display[s] an intent' to create 'a private remedy,'" *Abbasi*, 137 S. Ct. at 1856, much less does so "in clear and unambiguous terms," *Gonzaga Univ.*, 536 U.S. at 290. To the contrary, Section 14(e) "makes no provision whatever for a private cause of action." *Piper*, 430 U.S. at 24; *see also id.* at 42 (rejecting implied private right of action under Section 14(e) for tender offerors). And reading a private right of action into the statute also is inconsistent with congressional intent as reflected in the text of Section 14(e), which is directed exclusively at regulated persons. 15 U.S.C. § 78n(e) ("It shall be unlawful for any person . . . ."). Statutes like Section 14(e) that "focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Sandoval*, 532 U.S. at 289.

The Court's decision in *Transamerica* underscores the lack of any basis for implying a private right of action under Section 14(e). There, the Court found

an implied private right of action to void a contract under one provision of the Investment Advisors Act of 1940, but rejected a right of action for damages and other monetary relief under a separate section of the act. *See Transamerica*, 444 U.S. at 24. Like the statute that provided no private right of action in *Transamerica*, Section 14(e) "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." *Id.* at 19. And, in contrast to the statute from which the Court inferred a private right of action, Section 14(e) does not carry any "customary legal incidents" that include "the availability of a suit" by a private party. *Id.*

The Court's task is "'limited solely to determining whether Congress intended to create the private right of action asserted.'" *Abbasi*, 137 S. Ct. at 1856. Because Section 14(e) displays no sign of the requisite intent, the Court should adhere to its decades-long resistance to creating new causes of action, including under the securities laws, *see Transamerica*, 444 U.S. at 24; *Touche Ross*, 442 U.S. at 579; *Piper*, 430 U.S. at 42, and hold that there is no implied private right of action under Section 14(e).

B. Placing Sole Enforcement Authority in the SEC Comports with Congressional Intent and Maximizes Market Efficiency.

Not only is rejecting an implied private right of action in Section 14(e) the only outcome consistent with statutory intent, it has the corresponding benefit of best promoting the aims of the nation's securities laws. Leaving the SEC as the sole enforcer of Section 14(e) maximizes market efficiency, confer-

ring substantial benefits on companies and shareholders alike.

When interpreting securities laws—including in the context of whether they create implied private rights of action—this Court has paid careful attention to the congressional objectives that underpin the legislative framework. In *Piper*, for instance, the Court rejected an implied private right of action for unsuccessful tender offerors, emphasizing that a contrary holding might "prejudice[]" shareholders "because some tender offers may never be made if there is a possibility of massive damages claims for what courts subsequently hold to be an actionable violation of § 14(e)." 430 U.S. at 39–40. Similarly, the Court rejected implying aiding-and-abetting liability in a private suit under Rule 10b-5 and explained that imposing such liability "exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). And the Court adopted a demanding materiality standard for disclosure provisions on the basis that a less restrictive standard risked incentivizing companies to "bury the shareholders in an avalanche of trivial information . . . that is hardly conducive to informed decisionmaking." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976).

Fidelity to these and other congressional aims compels rejecting an implied private right of action under Section 14(e). As a threshold matter, *amici* strongly believe that securities fraud can cause substantial harms to the market and, as a result, must be regulated. *See, e.g.*, Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A*

critical Analysis, 158 Penn. L. Rev. 2173, 2179 (2010) [hereinafter "Rose, *The Multienforcer Approach*"] ("Securities fraud, like other failures in the market for information, produces deadweight social costs that may justify regulation."); A.C. Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 Va. L. Rev. 925, 937–38 (1999) (describing costs of securities fraud). Among other ills, securities fraud "increases the cost of capital in a variety of ways," "upset[s] the efficient allocation of resources in the economy," and "disguise[s] poor management and prevent[s] value-enhancing changes in control." Rose, *The Multienforcer Approach*, *supra* at 2179–80; *accord* Pritchard, *supra* at 937–38.

But the worthy pursuit of securities fraud must be tempered by the recognition that over-enforcement can damage markets and shareholders as well. "Just as securities fraud increases the cost of capital and reduces allocative efficiency, so, too, can misguided enforcement." Amanda M. Rose, *Designing an Efficient Securities Fraud Deterrence Regime*, The Heritage Foundation (Feb. 28, 2017), https://www.heritage.org/markets-and-finance/report/designing-efficient-securities-fraud-deterrence-regime. In fact, misguided enforcement "imposes a variety of other deadweight costs on firms and, ultimately, their shareholders, operating as a drag on economic growth." *Id.*

Concurrent public and private enforcement of securities laws gives rise to problems because of the different incentive structures between government agencies and private parties. "Private parties may, for example, rationally pursue claims that have a relatively low probability of success because defend-

ants have an incentive to settle in order to avoid the costs of defense or to avoid the small prospect of a very large adverse judgment." Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 Harv. L. Rev. 961, 969–70 (1994); *accord* Pritchard, *supra* at 952–53 ("If the plaintiffs can withstand a motion to dismiss, defendants generally will find settlement cheaper than litigation. . . . Any case plausible on the pleadings will have a positive settlement value if only to avoid the costs of discovery and attorneys' fees, which can be substantial in these cases."). Thus private parties "may pursue cases that the government would refuse to bring even [if] it had infinite resources." Grundfest, *supra* at 970. At the same time, private parties might "fail to bring cases that the government would enthusiastically pursue, if only it had the time and money." *Id.* To take one example, private-party plaintiffs likely would not sue judgment-proof defendants no matter how unlawful their actions, whereas the government, aiming to deter misconduct, still would have an incentive to seek redress. *Id.* n.23.

As a result of the divergent incentives and objectives motivating public and private enforcement, "[l]aw and economics scholarship teaches that it is especially difficult to achieve optimal deterrence when private parties are granted the right to enforce overbroad liability rules for financial reward." Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 Colum. L. Rev. 1301, 1304 (2008) [hereinafter "Rose, *Reforming Securities Litigation Reform*"]. This is particularly true in the securities-fraud context, where "[t]he set-

tlement dynamic . . . fatally undermines the deterrent value" of securities class actions. Pritchard, *supra* at 959; *see also, e.g.*, Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1083 (2019) [hereinafter "*Rise of Securities-Fraud Class Actions*"] (explaining that the structure of class actions "encourages plaintiffs to file lawsuits in even the most tenuous of cases" and puts "enormous" pressure on defendants "to settle and avoid the uncertain crucible of a securities-fraud trial" if they lose at the class-certification stage); Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. Fin. Econ. 207, 208 (2009) ("[P]rivate lawsuits . . . often do not penalize the relevant actors, can distort incentives, and can be inefficacious.").

A securities-fraud enforcement regime that over-deters regulated persons causes sweeping harm—including "some of the very same social costs as securities fraud itself," Rose, *The Multienforcer Approach*, *supra* at 2184. Over-deterrence "can increase the cost of capital (e.g., if fear of liability causes companies to overinvest in precautionary measures or causes financial intermediaries to charge more for their services) and upset the allocative efficiency of the economy (e.g., if fear of liability causes companies to reduce disclosure of truthful information or, conversely, to disclose too much trivial information, thereby impeding share-price accuracy)." *Id.*

Recognizing that Congress intended to vest the SEC with sole authority to enforce Section 14(e) is the best way to deter and remediate serious violations while guarding against the crushing costs of over-enforcement. For starters, consolidating en-

forcement authority in the SEC would reduce the threat of over-deterrence and its attendant harms. Indeed, "[t]he major advantage of centralizing authority is that the SEC, acting alone, can achieve a more optimal level of deterrence than the current multienforcer system does" because the SEC "does not have the same incentives as plaintiffs' attorneys do to bring frivolous cases, so it can instead focus on pursuing only meritorious cases." *Rise of Securities-Fraud Class Actions*, *supra* at 1084; *accord* Rose, *The Multienforcer Approach*, *supra* at 2195 (explaining that a "well-incentivized enforcer," like the SEC, "would forgo bringing some cases that might indeed win because it does not believe the defendants truly acted with scienter or because it recognizes that significant uncertainty exists on that score"); James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 Cal. L. Rev. 115, 122 (2012) (explaining that public enforcers are "less likely to bring a questionable action where the social costs are high").

To the extent that the SEC exercises such restraint, it could "reduce the occurrence" of adverse outcomes to companies in enforcement actions despite their lack of merit, which, in turn, would decrease "the fear of legal error that leads to over-deterrence." Rose, *The Multienforcer Approach*, *supra* at 2195; *accord* Benjamin P. Edwards, *Disaggregated Classes*, 9 Va. L. & Bus. Rev. 305, 318 (2015) ("[A] purely public enforcement regime may be less likely to over-deter than an enforcement regime that relies on private enforcers."). Exclusive SEC enforcement also could lead to more "robust capital markets, as measured by market capitalization, trading volume, the number of domestic firms, and the

number of initial public offerings." Jackson & Roe, *supra* at 208.

The benefits of sole SEC enforcement—and burdens of private actions—are heightened in the tender-offer context. For one thing, private parties have enormous incentives to file suits under Section 14(e), using the threat of a deal-blocking injunction to obtain lucrative settlement offers from companies. Indeed, "injunctive relief is clearly the remedy of choice in tender offer litigation" precisely because "[i]t is at once the most painless and potent way to derail or retard a high-wheeling tender offer juggernaut." Roger J. Magnuson, *Shareholder Litigation* § 7:31. Doubtless for this reason, "[m]ultiple teams of plaintiffs file lawsuits challenging virtually every public company merger, often in multiple jurisdictions." Jill E. Fisch, *et al.*, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 Tex. L. Rev. 557, 558 (2015). This trend rapidly has gained steam in federal court in recent years. In the roughly three years since the Delaware Court of Chancery signaled that it would begin carefully scrutinizing settlements in these merger-objection cases, *see In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 885 (Del. Ch. 2016), more Section 14(e) suits have been filed in federal court than in the preceding twenty years combined.[3]

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[3] Sixty-four Section 14(e) actions were filed in federal court from 1996 through 2015. Since the beginning of 2016, at least ninety-six such actions have been filed in federal court. (All data has been taken from the Stanford Law School Securities Class Action Clearinghouse by searching for "1934 act claims – section 14e" in the "Claims" field at the following web address: http://securities.stanford.edu/advanced-search.html.)

"Because the litigation threatens the consummation of the deal if not resolved quickly and because corporations may view the settlement amount as a drop in the bucket compared to the overall transaction amount, defendants are motivated to settle even meritless claims." Browning Jeffries, *The Plaintiffs' Lawyer Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 Berkeley Bus. L.J. 55, 58 (2014). Predictably, this pattern of frivolous suit followed by coerced settlement yields "negative economic effects and . . . inequities . . . that result in no benefits to shareholders and windfalls to attorneys." *Id.* at 59–60.

Exclusive SEC enforcement also can best protect the benefits of mergers and acquisitions, which are a critical part of economic growth and dynamism. Indeed, "[a]ll parties benefit" in the tender-offer process. Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161, 1173 (1981). As this Court has emphasized, tender offers give shareholders the "opportunity to sell their shares at a premium"; allow for the "reallocation of economic resources to their highest valued use, . . . which can improve efficiency and competition"; and incentivize "incumbent management to perform well so that the stock prices remain high." *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982). Congress, too, recognized these benefits of the tender-offer process when enacting the Williams Act, of which Section 14(e) is a key part. *See, e.g.*, James R. Pagano, *The Constitutionality of Second Generation Takeover Statutes*, 73 Va. L. Rev. 203, 220–21 (1987). Over-deterrence in the tender-offer context thus takes a particularly pernicious toll on the economy. The SEC, equipped with sole en-

forcement authority, is best able to ensure that the gains of tender offers are realized while still policing fraudulent conduct.

Recognizing that Congress intended the SEC to have sole authority to enforce Section 14(e) also would permit the Commission to "pursue a cooperative approach to regulation" by working collaboratively with companies to prevent fraud and make appropriate disclosures. Rose, *Reforming Securities Litigation Reform*, *supra* at 1336. That approach would increase efficiency by "encourag[ing] firms to adopt cost-effective internal controls to prevent fraud by their agents and . . . encourag[ing] well-intentioned officers to make cost-effective disclosure calls." *Id.*

Finally, reposing exclusive enforcement authority in the SEC would allow the agency to "create enforcement priorities and execute them properly." *Rise of Securities-Fraud Class Actions*, *supra* at 1085. The SEC, for instance, could identify the biggest threats to market efficiency and investor confidence and shape its Section 14(e) enforcement priorities to focus on combating and remediating those problems. Private enforcement undermines the SEC's pursuit of a cogent enforcement strategy because of the incentives of private parties to "relentlessly file[] suit" across the board. *See id.*[4]

Refusing to imply a private right of action in Section 14(e) thus would advance congressional objectives by maximizing market efficiency while still preventing the evils of securities fraud. The SEC—

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[4] Of course, the SEC's power is not unchecked. Its enforcement authority is expressly granted—and limited—by statute.

granted with "an arsenal of flexible enforcement powers," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976)—is best able to realize the objective of Section 14(e) to "ensure that shareholders 'confronted by a cash tender offer for their stock [would] not be required to respond without adequate information,'" *United States v. O'Hagan*, 521 U.S. 642, 667 (1997). Permitting private enforcement despite a lack of any intent in Section 14(e) to do so runs counter to this Court's recent precedents. Private enforcement also risks undermining Congress's disclosure objectives by leading companies to "bury the shareholders in an avalanche of trivial information" out of a "fear of exposing [themselves] to substantial liability," *TSC Indus.*, 426 U.S. at 448; more broadly, it risks thwarting beneficial merger activity because of the "possibility of massive damages claims" under Section 14(e), *Piper*, 430 U.S. at 40.

In sum, resisting Respondents' and the Ninth Circuit's "invitation to have one last drink," the Court should decline to "ventur[e] beyond Congress's intent" and hold that Section 14(e) is not privately enforceable. *See Sandoval*, 532 U.S. at 287.[5]

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[5] The Court should not hesitate to consider the fundamental question whether there is an implied private right of action under Section 14(e). *See, e.g., Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (explaining that Court has discretion to consider issues "'fairly included' within the questions presented," such as those that are "'predicate to an intelligent resolution' of the question presented"); *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 266 n.12 (1992) (considering issue that was "fairly included" within the question presented and briefed on the merits).

C. Congress Remains Free to Create a Private Right of Action.

Both the text and legislative intent of Section 14(e) overwhelmingly militate against implying a private right of action to enforce the statute. The Court thus should reject the decision below and other lower-court decisions that have found an implied private right of action under Section 14(e). If Congress subsequently decides that Section 14(e) should be pri-privately enforceable—a step that it conspicuously has not yet taken—it can pass legislation providing an express right of action under the statute.

The Court made much the same point when rejecting an implied private right of action under Section 17(a) of the Securities Exchange Act of 1934 in *Touche Ross*. As the Court explained there, "nothing we have said prevents Congress from creating a private right of action on behalf of brokerage firm customers for losses arising from misstatements contained in the § 17(a) reports." *Touche Ross & Co*, 442 U.S. at 579. "But," the Court emphasized, "if Congress intends those customers to have such a federal right of action, it is well aware of how it may effectuate that intent." *Id.*

So too here. If Congress decides that Section 14(e) ought to be privately enforceable, it has ample means to make that happen should the Court reject an implied private right of action in this case.[6]

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[6] *Amici* do not argue that there is no implied private right of action under Section 10(b) of the Securities Exchange Act of 1934. In contrast to Section 14(e), which the Court never has indicated, let alone held, includes an implied private right of action, the Court has "long recognized an implied private cause of action to enforce [Section 10(b)] and its implementing regula-

II. AT A MINIMUM, THE COURT SHOULD HOLD THAT A PRIVATE PLAINTIFF MUST PROVE SCIENTER TO PREVAIL UNDER SECTION 14(e).

Even if the Court declines to reach the question whether there is no implied private right of action under Section 14(e), it should reverse the decision below on the ground that scienter, not mere negligence, is the proper fault standard under the statute. The Ninth Circuit's negligence standard doubles down on the departure from statutory intent because it flows from two inferences untethered to statutory text or history: (1) that Congress intended Section 14(e) to be privately enforceable, and (2) that, with respect to private actions, Congress intended to adopt the most sweeping liability standard short of strict liability. Permitting private plaintiffs to prevail on a showing of mere negligence likely would encourage doubly vexatious litigation that undermines the fabric of the nation's securities laws. Affirming the decision below also would represent the first time since this Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), that the Court has found an implied private right of action that could be proven through mere negligence. It would produce a particularly anomalous result, moreover, in light of the absence of any procedural

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tion," *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014). Private claims under Section 10(b), moreover, do not exert the same irresistible settlement pressure on defendants as do Section 14(e) claims, given that plaintiffs proceeding under Section 10(b) "seldom" seek injunctive relief. *See* Magnuson, *supra* at § 2:32. Because private plaintiffs raising Section 14(e) claims often seek to enjoin a pending transaction, however, defendants in those cases face a choice between settlement and deal failure.

limitations on any implied private right in Section 14(e). *See* Br. of Pet'rs at 43–44.

As an initial matter, the Court consistently has emphasized the need for restraint when interpreting the scope of an implied private right of action. The Court has stressed the "narrow scope that [it] must give the implied private right of action," *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 144 (2011), and referred to its "general reluctance to extend judicially created private rights of action," *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018). *See also, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 2008) ("Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us."). The need to narrowly cabin implied private rights of action counsels strongly in favor of adopting a scienter standard.

A scienter standard, rather than a negligence standard, is all the more warranted in light of the inherently vexatious nature of private securities-fraud litigation. As this Court has explained, "'litigation under Rule 10b-5'"—a provision analogous to Section 14(e)—"'presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.'" *Cent. Bank of Denver*, 511 U.S. at 189.

First, with regard to "securities laws governing disclosure of information[,] even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421

U.S. 723, 740 (1975). Thus "[t]he very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Id.* Second, "[t]he potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation," thereby incurring "social cost[s]" by "permit[ting] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value." *Id.* at 741; *accord Stoneridge*, 552 U.S. at 163 (reaffirming that "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies"). These concerns are magnified in the tender-offer context, in light of the pressures exerted by private plaintiffs' ability to block a pending transaction and the time-sensitive nature of the deals.

Requiring private plaintiffs alleging Section 14(e) violations to establish only negligence will amplify the vexatiousness of litigation under that provision. A less stringent fault standard unquestionably will spur more private plaintiffs to file suit, thereby thwarting beneficial business activity and "extort[ing]" more "settlements from innocent companies." *Stoneridge*, 552 U.S. at 163; *see Blue Chip Stamps*, 421 U.S. at 740–41. Negligence liability in disclosure actions under Section 14(e) threatens other "frightening" consequences, including bottling up information beneficial to shareholders and the investing public and depriving companies of their ability to debunk harmful rumors. *See SEC v.*

Tex. Gulf Sulphur Co., 401 F.2d 833, 866–67 (2d Cir. 1968) (Friendly, J., concurring).

As Justice Powell wrote when explaining why Section 10(b) should not be read to provide a cause of action for persons who neither purchased nor sold a security, "[t]he courts already have inferred a private cause of action that was not authorized by the legislation." *Blue Chip Stamps*, 421 U.S. at 759 (Powell, J., concurring). By layering a negligence standard unmoored from Section 14(e) on top of an equally unmoored implied right of action, the decision below dramatically expands the reach of the statute and the opportunities for mischief. "If such a far-reaching change is to be made, with unpredictable consequences for the process of raising capital so necessary to our economic well-being, it is a matter for Congress, not the courts." *Id.* at 759–60 (Powell, J., concurring).

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

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In The
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EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF PHILLIP GOLDSTEIN IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is a stockholder of Pershing Square Holdings, Ltd., ("PSH"), a company that was sued along with other parties in the U.S. District Court for the Central District of California by stockholders of Allergan in two class action lawsuits entitled *In Re Allergan, Inc. Proxy Violation Securities Litigation*, Case No. 8:14-cv-2001-DOC, and *In re Allergan, Inc. Proxy Violation Derivatives Litigation*, Case No. 2:17-cv-04776-DOC, ("the Allergan lawsuits") alleging violations of, among other things, Section 14(e) of the Securities Exchange Act of 1934, the same statute that Emulex is alleged to have violated in this case. After the District Court declined to dismiss the case on the asserted ground that there is no private right of action to enforce Section 14(e), the parties settled for a total of $290 million, of which PSH paid $86.4 million. *Amicus curiae* seeks to do away with such lawsuits in the future by persuading this Court to declare categorically that there is no private right of action to enforce Section 14(e).

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[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question presented is: "Whether the Ninth Circuit correctly held, in express disagreement with five other courts of appeals, that Section 14(e) of the Securities Exchange Act of 1934 supports an inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer." That question can be bifurcated into two questions:

1. Whether Section 14(e) of the Securities Exchange Act of 1934 supports an inferred private right of action. ("the Threshold Question")

2. If so, whether the Ninth Circuit correctly held, in express disagreement with five other courts of appeals, that such inferred private right of action may be based on a negligent misstatement or omission made in connection with a tender offer. ("the Conditional Question")

I submit that the briefs by (1) the Chamber of Commerce of the United States as *amicus curiae* supporting a writ of certiorari, and (2) the petitioners on the merits demonstrate that there is no basis to infer that Congress intended to permit private parties to enforce Section 14(e). Although this Court may resolve this case in favor of the petitioner by a "no" answer to either question, the purpose of this brief is to persuade

it that it should not avoid answering the Threshold Question.[2]

ARGUMENT

I. Every Federal Court has a Duty to Determine Whether a Plaintiff has Standing.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231 (1990)) (internal quotation marks omitted). This "special obligation [of every federal court] to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review' [is not waived] even though the parties are prepared to concede it." *FW/PBS, supra*, at 231 (internal citations omitted). Further, defects in subject matter jurisdiction require correction regardless of whether the error was raised in a lower court. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908).

[2] I take no position on whether this Court should also answer the Conditional Question.

A. Neither the District Court nor the Circuit Court Determined That Congress Intended to Create a Private Remedy for a Violation of Section 14(a).

The District Court did not address the Threshold Question and dismissed the case based upon its finding that the answer to the Conditional Question is "no." On appeal, the Circuit Court reversed that finding after dispatching the Threshold Question with a single sentence: "It is undisputed that Section 14(e) provides for a private right of action to challenge alleged misrepresentations or omissions in connection with a tender offer."[3] The Circuit Court did not cite any basis for that conclusion.

B. This Court Should Answer the Threshold Question.

A vigorous debate occurred in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) as to whether, as the majority opinion held, "[t]he requirement that jurisdiction be established as a threshold matter . . . is

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[3] The Circuit Court did not indicate who would have an opportunity to dispute that conclusion. In addition, by contrast, immediately preceding that sentence, the Circuit Court wrote that "it would be [incorrect] to imply a remedy under Section 14(d)(4) [because that would be contrary to the guidance in] *Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) ('Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.')" It did not explain why it did not apply the same reasoning to assess whether a private remedy under Section 14(e) is available.

inflexible and without exception." (Internal citation omitted.) Justice Breyer took a less absolute stance: "I [] agree [with Justices O'Connor and Kennedy] that federal courts often, and typically should, decide standing questions at the outset of a case [except] when doing so would cause serious practical problems." Justice Stevens, concurring in the judgment (and joined by Justice Souter on this point), asserted that, when this Court is faced with the questions of whether constitutional standing (injury in fact, causation, and redressability) and/or statutory standing are lacking, "we have the power to decide the statutory question first." Here, (1) the Threshold Question can be readily answered by a straightforward reading of Section 14(e) in context and thus causes no practical problems, and (2) constitutional standing is not at issue. Consequently, it is reasonable to infer that no justice that participated in *Steel Co.* would argue that, regardless of whether an alleged omission or misstatement must be fraudulent or merely negligent to constitute a statutory violation, if there is an easily answered question as to whether *any* private party has statutory standing to enforce the statute, this Court should not do so.

II. There are Good Reasons to Answer the Threshold Question Now.

A. Answering the Threshold Question Now Promotes Judicial Efficiency.

No federal court should waste resources on a suit seeking a private remedy for a violation of a statute if there is no evidence that Congress intended to create

one. Here, no heavy lifting is required for this Court to eliminate such wasted resources.

B. Answering the Threshold Question Now Will Promote Justice.

In the Allergan lawsuits, the District Court, in an order denying a motion to dismiss, found that "the case law indicates that § 14(e) contains a private right of action" based solely upon "the Ninth Circuit's guidance on this issue" despite the fact that such "guidance" did not address Congressional intent. Had it applied the methodology this Court first set forth in *Alexander v. Sandoval*, 532 U.S. 275 (2001) to determine Congressional intent, it would have dismissed the cases. That flawed ruling cost the defendants $290 million. This Court should answer the Threshold Question now to preclude similar injustices in the future.

C. This Court Should Reinforce the Obligation of the Lower Courts to Faithfully Apply *Sandoval*.

In *Sandoval* and its progeny, this Court has made it clear that a federal court should not infer a private right of action unless it determines that Congress "unambiguously" intended to confer such a right on an aggrieved person.[4] The Ninth Circuit has properly considered Congressional intent in other

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[4] *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)

(post-*Sandoval*) cases.[5] Yet, neither the Ninth Circuit in this case nor the District Court in the Allergan lawsuits applied *Sandoval*.

Another example of a Circuit Court giving short shrift to *Sandoval* is footnote 9 in *Hallwood Realty Partners, LP v. Gotham Partners, LP*, 286 F.3d 613, 618 (2d Cir. 2002), a lawsuit brought by a company against a security holder to enforce § 13(d) of the Securities and Exchange Act. In relevant part, that footnote reads:

> In declining to hold that issuers may obtain damages, we in no way intend to cast doubt on the continued validity of [*GAF Corp. v. Milstein*, 453 F.2d 709, 720 (2d Cir.1971)] with respect to injunctive relief. Notably, the Supreme Court has not sought to reconsider the existence of causes of action, such as the right to injunctive relief recognized in *GAF Corp.*, that were implied under the now dubious analysis of [*J. I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964)].

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[5] See, e.g., *Northstar Financial Advisors, Inc. v. Schwab Investments*, 615 F.3d 1106, (2010) (no private cause of action under § 13(a) of the Investment Company Act of 1940); *In re Digimarc Corp. Derivative Litigation*, 549 F.3d 1223 (2008) (no private cause of action under § 304 of the Sarbanes-Oxley Act); *Logan v. U.S. Bank National Association*, 722 F.3d 1163 (2013) (no private cause of action under § 702(a) of the Protecting Tenants at Foreclosure Act); *Segalman v. Sw. Airlines Co.*, 895 F.3d 1219 (9th Cir. 2018) (no private cause of action under the Air Carrier Access Act of 1986).

Sandoval made clear that *Borak* was wrongly decided and firmly established binding guidance that is applicable to *every* federal statute and every federal court. Since this Court has never considered the analysis in *GAF Corp.* (which relied solely on *Borak*), there is no reason to "reconsider" it. The Second Circuit's rationalization for clinging to a "now dubious" pre-*Sandoval* precedent seems disingenuous and specious.

This Court should take this opportunity to remind lower courts of their obligation to determine *in every instance* in which a private party seeks to enforce a federal statute whether Congress intended to create a private remedy – and to dismiss such a lawsuit if it finds that Congressional intent is lacking.

CONCLUSION

For the foregoing reasons, this Court should answer the Threshold Question.

Dated: February 26, 2019

Respectfully submitted,

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BRIEF FOR INSTITUTIONAL INVESTORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 Vand. L. Rev. 603 (2018) ..... *passim*

William D. Cohan, *Ackman Admits Mistake, but Chipotle Bet Could Be Another*, N.Y. Times (Nov. 18, 2016), https://www.nytimes.com/2016/11/19/business/dealbook/ackman-admits-mistake-but-chipotle-bet-could-be-another.html 17

Cornerstone Research, *Securities Class Action Settlements: 2017 Review and Analysis* (2018) 21

Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation* (2018) 21

Antoine Gara, *Bill Ackman and Valeant Settle Allergan Insider Trading Lawsuit for $290 Million*, Forbes (Dec. 30, 2017), https://www.forbes.com/sites/antoinegara/2017/12/30/bill-ackman-and-valeant-settle-allergan-insider-trading-lawsuit-for-290-million/#aaf3c861f326 17

Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 Vand. L. Rev. 1053 (2013) 32

H.R. Rep. No. 90-1711 (1968) 13

H.R. Rep. No. 104-369 (1995) (Conf. Rep.) 11

Press Release, SEC, *Allergan Paying $15 Million Penalty for Disclosure Failures During Merger Talks* (Jan. 17, 2017), https://www.sec.gov/news/pressrelease/2017-16.html 17

Abby F. Rudzin et al., *From Chancery Court to Federal Court: The Obstacles to a Post-*Trulia *Migration*, 50 Rev. Sec. & Commodities Reg. 41 (2017) 29

S. Rep. No. 90-550 (1967) 13

S. Rep. No. 104-98 (1995) 11, 12, 14

SEC, *Division of Enforcement Annual Report* (2018) 15

SEC, *Fiscal Year 2019 Congressional Budget Justification Annual Performance Plan* 5, 14, 15, 16

Mark Terry, *Arrogance and Greed: Ackman, Valeant Pay $290M to End Allergan Insider Trading Lawsuit*, BioSpace (Jan. 2, 2018), https://www.biospace.com/article/unique-arrogance-and-greed-ackman-valeant-pay-290m-to-end-allergan-insider-trading-lawsuit/ 17

U.S. Chamber Inst. for Legal Reform, *A Rising Threat: The New Class Action Racket That Harms Investors and the Economy* (2018)..... 22, 31

U.S. Chamber Inst. for Legal Reform, *The Trial Lawyers' New Merger Tax* (2012)..... 31

INTEREST OF AMICI[1]

Amici are institutional investors who buy, hold, and sell billions of dollars of federally regulated securities. As investors, amici have an interest in both promoting effective enforcement of the Nation's securities laws and deterring baseless litigation whose cost is ultimately borne by shareholders. In amici's view, private enforcement of Section 14(e)'s tender offer provisions serves an essential function in promoting the integrity of financial transactions and investor confidence in our financial markets. While amici support efforts to constrain strike suits, they believe the solution proposed by petitioners and their amici – the complete elimination of private enforcement of Section 14(e) – would do far more harm than good, given the broad range of tools Congress has provided defendants for responding to meritless securities litigation.

Amici include:

The Arkansas Teacher Retirement System provides retirement, disability, survivor, and death benefits to public school teachers and other educationally related employees in the State of Arkansas.

The Florida State Board of Administration manages over $200 billion in assets. It was created by the Florida Constitution and is governed by a three-

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel contributed money to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

member Board of Trustees, comprised of the Governor as Chair, the Chief Financial Officer, and the Attorney General. The SBA is required to invest assets and discharge its duties in accordance with Florida law and in compliance with fiduciary standards of care.

The National Conference on Public Employee Retirement Systems (NCPERS), which is the largest trade association for public sector pension funds, representing approximately 500 funds throughout the United States and Canada. NCPERS is a unique network of public trustees, administrators, public officials and investment professionals who collectively oversee nearly $3 trillion in retirement funds managed on behalf of seven million retirees and nearly 15 million active public servants, including firefighters, law enforcement officers, teachers, and other public servants.

The New York City Board of Education Retirement System provides pension benefits to approximately 34,000 active and 18,000 retired members, primarily non-pedagogical employees of the New York City Department of Education.

New York City Employees' Retirement System is a public employee retirement system that provides retirement, disability, and death benefits to over 350,000 active and retired New York City employee participants.

The New York City Fire Department Pension Fund is a single-employer public employee retirement system serving full-time uniformed employees of the New York City Fire Department. It serves over 28,550 active and retired members, including widows and beneficiaries.

The New York City Police Pension Fund provides pension benefits for uniformed members of the New York City Police Department and currently serves approximately 88,000 active and retired members and their beneficiaries.

The Public Employee Retirement System of Idaho provides retirement, disability, survivor, and other benefits to more than 155,000 members. Its membership is comprised of retirees, beneficiaries, and active public employees working for more than 795 employers across the State of Idaho.

The Teachers' Retirement System of the City of New York provides retirement benefits for approximately 200,000 current and former employees of the New York City Department of Education, participating New York City Charter Schools, and the City University of New York.

SUMMARY OF ARGUMENT

For the reasons given by respondents and other amici, the Court should reject petitioners' assertion that Section 14(e) of the Securities Exchange Act of 1934,[2] 15 U.S.C. § 78n(e), requires proof of scienter. The Chamber of Commerce nonetheless urges this Court to eliminate the long-recognized private right of action to enforce Section 14(e) on the ground that the cost of such litigation outweighs its benefits. That policy argument fails, disregarding the manifest benefits of private enforcement while exaggerating the incidence and cost of meritless merger litigation. At the same time, on the Chamber's own telling, its proposed solution will have no actual effect because savvy plaintiffs, it says, can simply replead their Section 14(e) claims under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), whose private right of action the Chamber does not challenge. That is not correct – Section 14(e) covers additional important ground. But even if the Chamber were right, that would just mean that having identified a problem of questionable urgency, the Chamber proposes no real solution. Its brief therefore gives this Court no reason to address the validity of Section 14(e)'s private right of action, particularly given petitioners' failure to raise the issue in the lower courts.

I. The Chamber's attack on private enforcement of Section 14(e) is meritless. This Court and Congress have repeatedly recognized that private enforcement of our securities laws provides a vital supplement to the limited enforcement capacity of the Securities and

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[2] Ch. 404, 48 Stat. 881 (15 U.S.C. § 78a *et seq.*).

Exchange Commission (SEC). *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (collecting citations). This includes private enforcement pursuant to private rights of action inferred by the courts decades ago that have become an established part of the congressional design. *See ibid.* (discussing implied right of action under Section 10(b)).

Indeed, the SEC itself has recently emphasized how stretched its resources have become. Recent hiring freezes and budget cuts have reduced the agency's enforcement staff and capabilities, even while "securities markets have grown increasingly complex and opaque," making efforts to manipulate it "increasingly complex and more difficult to identify." SEC, *Fiscal Year 2019 Congressional Budget Justification Annual Performance Plan* 24 (*SEC FY2019 Justification*).[3] At the same time, private enforcement provides remedies to investors genuinely injured by violations of the law and creates a deterrent counterweight to the enormous financial incentives for fraud.

To be sure, private enforcement also creates a risk of abusive litigation. But Congress and the courts have been extremely attentive to that risk, providing defendants a variety of tools to dismiss meritless cases early on, to limit discovery before a motion to dismiss is resolved, and to impose severe sanctions on the filing of frivolous claims. As the Chamber itself describes, the Delaware Court of Chancery – which has traditionally decided the bulk of merger litigation – has also recently undertaken to clamp down on disclosure-only settlements in which defendants

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[3] *Available at* https://www.sec.gov/files/secfy19congbudgjust.pdf.

provide immaterial additional disclosures and pay significant attorney's fees. Federal courts are starting to follow suit.

II. The Chamber nonetheless complains that a handful of plaintiffs' firms are seeking to evade those protections by filing Section 14(e) cases in federal court and extracting quick settlements in exchange for dismissing their claims. Because the settlements are never filed in court, the Chamber resorts to speculating about their terms, which it assumes offer no value to shareholders and represent nothing more than frivolous strike suits. If those assumptions were valid, amici would agree that the pattern of suits is troubling and should be discouraged. But the Chamber exaggerates the extent of any problem, which does not justify the draconian response of eliminating private enforcement altogether.

First, the number of cases the Chamber identifies as suspicious is small. It cites fewer than three suspicious settlements per year between 2003 and 2016 (and none before that). And while it asserts a spike in 2016 and 2017, the number falls by nearly a third in 2018, and to an annualized rate of only six cases per year based on the early data from 2019. In none of these cases did the plaintiffs obtain (or even ask for) a preliminary injunction that would have prevented a merger from closing. Nor is there evidence of any discovery taking place or other indications that substantial litigation costs were imposed. The only cost the Chamber identifies is attorney's fees. But even those costs are modest. The Chamber's own authorities show that the cases are settling for a fraction of the attorney's fees that have traditionally been awarded and conclude that it is

"questionable whether [mootness fees] are sufficient to sustain a litigation practice in this area." Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 Vand. L. Rev. 603, 626 (2018) (*Shifting Tides*); *see also* Chamber Br. 26-27 (citing *Shifting Tides* as principal empirical authority on voluntary dismissals). The Chamber thus is asking the Court to make long-term decisions about the enforcement of Section 14(e) based on what is at best a minimal problem that may well be a short-term phenomenon that will correct itself.

Second, even as described, the costs of this small number of allegedly troublesome settlements are dwarfed by the benefits of private enforcement. A single settlement in one recent Section 14(e) case obtained $290 million in relief for injured investors, more than *ten times* the amount of attorney's fees the Chamber estimates was extracted through *all* the recent suspicious settlements the group highlights. And that is before taking into account the substantial benefits created by the deterrent effect of private enforcement.

Third, to the extent an intolerable number of obviously meritless suits continues to be filed, it will be because defendants have elected to tolerate, and even encourage, them by failing to engage in any meaningful resistance. As noted, Congress has provided defendants numerous tools for avoiding shake downs. Yet the defining characteristic of the cases the Chamber cites is that the defendants have agreed to settle the cases before availing themselves of *any* of those protections. That is, even though Congress has enacted heightened pleading standards to facilitate motions to dismiss, even though Congress has directed that discovery be stayed pending any

motion to dismiss in order to reduce settlement pressures, even though Congress has authorized courts to review the substance and attorney's fees of proposed class settlements, and even though Congress has directed courts to issue sanctions against attorneys filing frivolous claims, the Chamber's defendants have uniformly failed even to file a motion to dismiss and instead have worked with plaintiffs to avoid judicial scrutiny of the settlements and fees. Defendants cannot claim that private Section 14(e) enforcement must be eliminated in order to get rid of lawsuits that Defendants themselves could eliminate, but have chosen to finance instead.

All of which may be why none of the authorities the Chamber cites – including its own prior reports on the purported problems with merger litigation – has recommended elimination of private Section 14(e) litigation.

III. The Chamber ends its discussion by explaining that its proposed solution will not actually address any of the problems it has claimed to identify. It says that the Court should not be concerned about eliminating private Section 14(e) suits because they can all be repleaded as private Section 10(b) suits (the validity of which the Chamber does not question). That is not correct. For example, Section 14(e) addresses forms of insider trading not captured by Section 10(b). But even if the Chamber were right, that would just mean that eliminating the Section 14(e) right of action will do little to discourage the filing of merger strike suits.

That being so, there is no reason for this Court to address whether a private right of action for Section 14(e) claims exists. The case was litigated below on

the assumption that private enforcement was permitted, and this Court can easily resolve the case on the same understanding.

ARGUMENT

Petitioners' principal argument in this Court – and the only argument made to the Ninth Circuit panel – is that Section 14(e) requires proof of scienter. As respondents and others have explained, that argument lacks merit. Petitioners also argue for the first time in this Court that even if Section 14(e) does not require scienter, the Court should reverse on the ground that there is no private right of action for Section 14(e) violations. In support of that request, the Chamber of Commerce argues that "the costs of recognizing such a right significantly outweigh the benefits." Br. 19. "In particular," it claims, "an examination of Section 14(e) litigation over the past twenty-three years shows that the Section 14(e) private right has become little more than a costly vehicle for plaintiffs' attorneys to extract fees from corporate acquisitions involving tender offers." *Ibid.*

Respondents and other amici demonstrate that petitioners' attack on the long-settled private right of action to enforce Section 14(e) is unfounded as a matter of legal doctrine. This brief explains why the Chamber's naked policy argument lacks merit as well. In particular, the Chamber ignores the substantial benefits of private litigation as a supplement to the necessarily limited capacity of the SEC. It vastly overstates the significance of meritless Section 14(e) litigation, which is already subject to substantial constraints imposed by Congress and the courts. The Chamber further ignores that the settlements it

decries arise only because defendants elect not to use any of the defensive tools at their disposal, and instead collaborate with a small number of plaintiffs' firms to produce settlements that evade judicial review. And the Chamber inexplicably concludes its argument with an assurance that eliminating the Section 14(e) private right of action won't change any of this anyway, because plaintiffs can simply refile the same claims under Section 10(b).

All of which is no doubt why none of the authorities the Chamber invokes – including prior reports by the Chamber of Commerce itself – has ever suggested that any problem with strike suits be dealt with by eliminating private enforcement of Section 14(e). And it is why the Court should not decide in this case the validity of the Section 14(e) private right of action.

I. The Chamber's Attack On Private Enforcement Of Federal Securities Law, And Section 14(e) In Particular, Is Unfounded.

The Chamber's purported cost-benefit analysis blinks reality. This Court and Congress have long recognized that private enforcement of federal securities laws plays an important, complementary role to federal regulators' efforts to police the massive number of transactions that occur in the world's largest economy. At the same time, Congress and the courts have been attentive to the risk of abuse, providing defendants multiple means to eliminate meritless suits at the outset, relieve settlement pressures, and reduce financial incentives for filing baseless litigation in the first place.

A. Congress And This Court Have Long Recognized The Benefits Of Private Enforcement Of Federal Securities Laws, Including Through Implied Rights Of Action.

Congress has repeatedly recognized that "private securities-fraud litigation furthers important public-policy interests, prime among them, deterring wrongdoing and providing restitution to defrauded investors." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 475 (2013) (citing H.R. Rep. No. 104-369, at 31-32 (1995) (Conf. Rep.)). Congress has found, for example, that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action." H.R. Rep. No. 104-369, at 31. Moreover, these "private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs." *Ibid.*

"Both Republican and Democratic Chairmen of the Securities and Exchange Commission have stressed the integral role of the private right of action in maintaining investor confidence." S. Rep. No. 104-98, at 37 (1995). For example, in 1991, the Chairman under President George H.W. Bush testified:

> Private actions under Sections 10(b) and 14(a) of the Exchange Act have long been recognized as a 'necessary supplement' to actions brought by the Commission and as an 'essential tool' in the enforcement of the federal securities laws. Because the

> Commission does not have adequate resources to detect and prosecute all violations of the federal securities laws, private actions perform a critical role in preserving the integrity of our securities markets.

Ibid.; *see also id.* at 38 (quoting 1995 testimony of Chairman under President Clinton to same effect).

As this testimony illustrates, the widespread acknowledgement of the value of private enforcement extends to implied rights of action, such as those recognized under Sections 10 and 14. For example, in the face of complaints principally about class actions under the implied right of action for securities fraud under Section 10(b), Congress did not choose to eliminate private enforcement, but instead enacted a variety of reforms to it through the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. *See generally Amgen*, 568 U.S. at 475-76. Thus, while the PSLRA states that it does not "create or ratify any implied private right of action," 15 U.S.C. § 78j-1 note, this Court has recognized that the statute is premised on Congress's understanding that Rule 10b-5 (17 C.F.R. § 240.10b-5) class actions would remain a "prominent feature of federal securities regulation." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165 (2008).

Other legislation has similarly responded to judicial decisions concerning implied rights of action by altering the details of the cause of action, rather than eliminating private enforcement altogether. *See, e.g.*, *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 293-94 (1993) (explaining that

after the Court adopted a short statute of limitations for Rule 10b-5 actions, "Congress intervened by limiting the retroactive effect of our decision") (citing 15 U.S.C. § 78aa-1).

B. Private Section 14(e) Actions, In Particular, Serve Important Purposes.

Private enforcement of Section 14(e) plays an equally important role in enforcing federal securities laws and maintaining the integrity of U.S. capital markets.

1. Private Enforcement Of Section 14(e) Is Essential To Supplement The SEC's Limited Enforcement Resources.

To start, no one can doubt that the requirements of Section 14(e) are of critical importance to maintaining the integrity of tender offers. Congress recognized that accurate information about the terms of the deal and the companies involved is essential to arriving at a fair valuation. *See, e.g.*, H.R. Rep. No. 90-1711, at 3-5 (1968); S. Rep. No. 90-550, at 2-4 (1967). Much of that information – *e.g.*, the offeror's plans for the company post-merger, the details of its financing, etc. – is inaccessible to shareholders except through disclosures by the parties proposing (or opposing) the deal. Those parties have a natural incentive to misrepresent or omit information in order to advance their preferred position. And many involved often have substantial financial incentives to shade the truth, or outright defraud investors, given the enormous stakes involved. With so much at stake, the injuries resulting from misrepresentations and frauds can be immense. Moreover, when fraud infects such consequential business transactions, faith in financial

institutions and markets inevitably suffers, to the detriment of the broader economy.

The requirements of Section 14(e) are, therefore, obviously important. But they do little good unless there is a credible threat of enforcement. "This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (describing role of litigation under implied private right of actions to enforce Section 10(b)); *accord Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986); *Bateman, Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975). So has Congress. *See, e.g.*, S. Rep. No. 104-98, at 8 ("'[P]rivate rights of action are not only fundamental to the success of our securities markets, they are an essential complement to the SEC's own enforcement program.'") (quoting former SEC Chairman Arthur Levitt).

None of this is surprising. The Chamber does not – and could not seriously – claim that the SEC has the resources to adequately scrutinize compliance with Section 14(e) on its own. The SEC is charged with overseeing "approximately $75 trillion in securities trading annually . . . and the activities of over 26,000 registered market participants." *SEC FY2019 Justification*, *supra*, at 3. "In addition, the SEC is responsible for selectively reviewing the disclosures and financial statements of over 8,000 reporting companies." *Ibid.* It must also evaluate the

"approximately 16,500 tips and complaints" it receives each year. *Id.* at 24.

The SEC recently told Congress that the "volume of potential securities violations continues to rise," *SEC FY2019 Justification*, *supra*, at 25, even while the Commission's enforcement staff has shrunk in response to budget cuts and a hiring freeze that had been in place since late 2016, *id.* at 3. *See also* SEC, *Division of Enforcement Annual Report* 4 (2018)[4] (reporting that SEC's "total headcount is down approximately 10% from its peak in FY 2016"); *id.* at 5 ("Due to budgetary constraints, we have lost many of our contracted legal support personnel and we have been subject to an agency-wide hiring freeze, limiting our ability to replace employees who have departed.").

As a result, the SEC's enforcement division has faced "significant challenges" "that stretch its limited resources." *SEC FY2019 Justification*, *supra*, at 23. For example, the Commission must struggle to keep up with the technological changes that have "dramatically transformed our markets" while enhancing "the ability of wrongdoers to engage in cyber-enabled misconduct," including "by hacking into the electronic accounts of others and then forcing trades to pump up a stock price, or the brokering of stolen inside information on the 'dark web,' paid for in untraceable cryptocurrency." *Id.* at 24. At the same time, the lawful "securities markets have grown increasingly complex and opaque" making efforts to

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[4] *Available at* https://www.sec.gov/files/enforcement-annual-report-2018.pdf.

manipulate them "increasingly complex and more difficult to identify." *Ibid.*

2. Private Section 14(e) Litigation Benefits Investors And The Public.

Private enforcement of Section 14(e) brings real benefits to investors and, through its deterrent effect, financial markets more broadly.

The recent cases challenging pharmaceutical company Valeant's tender offer to acquire Allergan (another drug company best known for producing Botox), provide an example. Prior to launching its tender offer, Valeant entered into a confidential agreement with a hedge fund management company, Pershing Square, under which Pershing would use its own money and funds from Valeant to purchase a 10% stake in Allergan. When Valeant later made a hostile tender offer to acquire Allergan, Allergan's stock price soared. Even though Valeant's tender offer ultimately failed (Allergan agreed to be acquired by another company at a higher price), Valeant and Pershing nonetheless reaped a $2.3 billion profit by selling the 10% stake they had quietly purchased in advance of the tender offer. *See Basile v. Valeant Pharm. Int'l, Inc.*, No. 8:14-cv-2004, Dkt. 639 Ex. 2, at 2-19 (C.D. Cal. Aug. 14, 2018) (*Valent* Summary Judgment Order) ("tentative order" granting in part plaintiffs' motion for partial summary judgment).

Investors subsequently sued Valent and Pershing, alleging violations of Section 14(e).[5] After the district

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[5] Implementing regulations deem trading on the basis of nonpublic information relating to a tender offer to be a

court tentatively granted plaintiffs' partial summary judgment, the case settled,[6] providing $290 million in relief to investors.[7]

Such settlements remedy investor injuries, but also provide a powerful deterrent effect. The Allergen case, for example, was widely publicized in the securities community as a disastrous outcome for both defendant companies and a warning to the industry as a whole.[8]

"fraudulent, deceptive or manipulative act or practice" under the statute. 17 C.F.R. § 240.14e-3(a).

[6] *See Valent* Summary Judgment Order at 1, 68.

[7] *See* David Benoit & Jonathan D. Rockoff, *Pershing Square, Valeant to Pay $290 Million to Settle Allergan Suit*, Wall St. J. (Dec. 29, 2017), https://www.wsj.com/articles/pershing-square-valeant-to-pay-290-million-to-settle-allergan-suit-1514571214.

In comparison, an SEC enforcement action related to the same merger netted a mere $15 million in penalties for a violation of reporting requirements. *See* Press Release, SEC, *Allergan Paying $15 Million Penalty for Disclosure Failures During Merger Talks* (Jan. 17, 2017), https://www.sec.gov/news/pressrelease/2017-16.html.

[8] William D. Cohan, *Ackman Admits Mistake, but Chipotle Bet Could Be Another*, N.Y. Times (Nov. 18, 2016), https://www.nytimes.com/2016/11/19/business/dealbook/ackman-admits-mistake-but-chipotle-bet-could-be-another.html (calling Valeant investment "disastrous"); *see also* Mark Terry, *Arrogance and Greed: Ackman, Valeant Pay $290M to End Allergan Insider Trading Lawsuit*, BioSpace (Jan. 2, 2018), https://www.biospace.com/article/unique-arrogance-and-greed-ackman-valeant-pay-290m-to-end-allergan-insider-trading-lawsuit/; Antoine Gara, *Bill Ackman and Valeant Settle Allergan Insider Trading Lawsuit for $290 Million*, Forbes (Dec. 30, 2017), https://www.forbes.com/sites/antoinegara/2017/12/30/bill-ackman-and-valeant-settle-allergan-insider-trading-lawsuit-for-290-million/#aaf3c861f326.

C. Congress And The Courts Have Provided Ample Means For Responding To Strike Suits, Short Of Eliminating The Private Right Of Action.

To be sure, a private right of action can be abused. But Congress and the courts have been attentive to this risk, providing defendants multiple ways to end meritless litigation quickly and courts a variety of ways to discourage strike suits.

In the PSLRA, Congress rejected calls to eliminate private enforcement of the Nation's securities laws in favor of providing a battery of new protections for defendants and requirements for plaintiffs' counsel. The statute imposed, for example, "[e]xacting pleading requirements" that require, among other things, that plaintiffs plead with particularity "both the facts constituting the alleged violation, and the facts evidencing scienter" when scienter is required. *Tellabs*, 551 U.S. at 313. It also provided "a 'safe harbor' for forward-looking statements" and, to prevent the costs of discovery from driving defendants to a premature settlement, mandated "a stay of discovery pending resolution of any motion to dismiss." *Amgen*, 568 U.S. at 476 (internal quotation marks omitted).

Moreover, judicial decisions in litigated cases (including summary judgment decisions in cases eventually settled, like the Allergan litigation) "have an impact beyond a single case in that they announce standards of conduct that guide participants in future transactions." *Shifting Tides*, *supra*, at 611-12.

To reduce the incentive for litigation seeking "extortionate settlements," Congress further "limit[ed] recoverable damage and attorney's fees," "impose[d] new restrictions on the selection of (and compensation awarded to) lead plaintiffs," and "mandate[d] imposition of sanctions for frivolous litigation." 568 U.S. at 475-76 (internal quotation marks omitted).[9]

As the Chamber itself has described, courts have taken additional steps in response to concerns about disclosure-only settlements providing insubstantial additional information to shareholders while providing substantial attorney's fees. Br. 24. In *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 887 (Del. Ch. 2016), for example, the Delaware Court of Chancery announced it would scrutinize the materiality of such disclosures before allowing significant fees. *See* Chamber Br. 24.

Federal courts have the same authority and responsibility, and some have already announced their intention to follow *Trulia*'s lead. For example, in *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718 (7th Cir. 2016), the Seventh Circuit embraced *Trulia*'s heightened scrutiny for disclosure-only settlements, then added that proposing a settlement that offers shareholders nothing but immaterial new disclosures may be grounds for replacing class counsel or even dismissing the suit. *See id.* at 725-26. Other courts

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[9] To prevent plaintiffs from avoiding these requirements by filing parallel claims under state law in state court, Congress enacted the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, which forbids courts from maintaining class actions alleging state law claims based on material misrepresentations or omissions in connection with the purchase or sale of securities. *See* 15 U.S.C. § 78bb(f)(1)(A).

have since followed suit, including in the Ninth Circuit. *See, e.g.*, *Sanchez v. IXYS Corp.*, 2018 WL 4787070, at *5 (N.D. Cal. Oct. 2, 2018).

II. The Chamber Fails To Identify Any Special Problem With Private Section 14(e) Litigation That Warrants Eliminating The Established Private Right of Action.

The Chamber nonetheless argues that the manifest benefits of private enforcement in this context are outweighed by a scourge of strike suits that have managed to evade the measures intended to prevent them. Br. 27. In particular, it claims that in the three years since *Trulia*, a handful of plaintiffs' firms have filed a number of Section 14(e) suits in federal court, only to voluntarily dismiss the cases in short order, presumably on the basis of a settlement. Although the settlements were not filed in court, the Chamber assumes they involved the defendants making immaterial supplemental disclosures and paying attorney's fees. *Id.* 26-27.

The Chamber's inferences are questionable. But to the extent the evidence suggests that some firms have made a business of filing meritless challenges to mergers in order to extract quick settlements of no value to shareholders, amici condemn that practice and agree it should be discouraged. However, as discussed, Congress and the courts have already provided defendants ways to avoid expensive litigation of meritless securities claims and to deprive unscrupulous lawyers of any significant financial incentive to file them. The Chamber's evidence suggests at best that some defendants have elected not to avail themselves of those protections when they can

settle cases for relatively small amounts. The Chamber cannot bootstrap that defense strategy into a reason to eliminate private enforcement of Section 14(e) altogether.

A. The Chamber's Disparagement Of Section 14(e) Litigation In General Is Unsupported.

There is little support for the Chamber's assertion that merger litigation in general, and Section 14(e) litigation in particular, largely consists of meritless strike suits.

For example, the Chamber says that "in 2017, 89 percent of all deal cases were dismissed," Br. 26, implying that this shows private Section 14(e) claims overwhelmingly lack merit. But the source it cites was reporting the disposition of cases filed in 2017 *and resolved by March 2018*, which was only a portion of the cases filed and an obviously unrepresentative sample. *See Shifting Tides*, *supra*, at 622-23 & tbl.2 n.*.[10] Another source more accurately reports that as of early 2018, only 4% of 2017 merger cases had been dismissed by courts. Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation* 6 (2018). Another 72% had been settled or voluntarily dismissed, and 24% remained pending. *Ibid.* The Chamber itself reports that more generally, only 28%

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[10] *See also* Cornerstone Research, *Securities Class Action Settlements: 2017 Review and Analysis* 15 (2018) ("Historically, cases that have taken longer to settle have been associated with higher settlements.").

of merger litigation is dismissed. U.S. Chamber Inst. for Legal Reform, *A Rising Threat: The New Class Action Racket That Harms Investors and the Economy* 9 (2018) (*Rising Threat*) (describing dismissal rate between 2003 and 2011).[11] That some additional number of cases are dismissed as part of a settlement says nothing about their merit. After all, cases with obvious merit can be expected to settle, and to do so early.

The Chamber nonetheless claims that most Section 14(e) suits are proven meritless by the fact that they result not in money judgements but in changes to the disclosures before the transaction takes place. Br. 23. But that, again, does little to show that the suits lacked merit or were filed to extract attorney's fees. One would think it is a *good* thing for the lawfulness of a firm's disclosures be settled *before* the transaction closes, thereby avoiding the prospect of protracted post-closure litigation with massive damages claims. Moreover, it is hardly surprising that such suits result in changes to corporate disclosures rather than increases in the tender offer or other monetary relief – Section 14(e) regulates only disclosures, not the substantive terms of an offer. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Shifting Tides*, *supra*, at 628. That is why cases that include challenges to the term of offers have historically been brought in state court (usually the Delaware Court of Chancery), which can entertain breach of fiduciary duty theories addressing the

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[11] None of the Chamber's data relates specifically to Section 14(e) claims.

substance of the deal. *See* Chamber Br. 24.[12] Therefore, one would expect that Section 14(e) claims seeking to *prevent* damage to shareholders *before* a deal closes would result in disclosure settlements.

The Chamber says that the disclosures provide no value to shareholders. Br. 22. To the extent the Chamber implies that disclosures are worthless as a general matter, that simply represents disdain for Congress's decision to require that material statements made in a tender offer be true and to forbid omissions that render material statements misleading. To the extent the Chamber is claiming that the specific disclosures required in the settlements it cites are immaterial, it provides no evidence for that claim, failing to give even a single example of an allegedly meaningless disclosure in the supposed legion of meritless suits it complains about. *See id.* 22-29.

And, of course, the Chamber itself points to a seemingly effective set of responses to valueless disclosure settlements that has been adopted in the Delaware Court of Chancery, including rejection of the settlement and reduction (or elimination) of attorney's fees. *See* Br. 24-25. The Chamber asserts that this set of responses has more or less put an end to such

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[12] It is in the context of *that* kind of litigation – in which plaintiffs originally allege that a company's directors violated their fiduciary duties in supporting a tender offer, but then settled for further disclosures with "no monetary compensation to the stockholders" – that the Delaware Court of Chancery has expressed concern about potential strike suits. *Trulia*, 129 A.3d at 891-92.

settlements in Delaware, notably without the courts eliminating private merger litigation altogether. *Ibid.*

B. The Chamber Overstates The Significance Of Section 14(e) Litigation Settled Through Voluntary Dismissals.

The Chamber says, however, that unscrupulous lawyers are now fleeing Delaware for the federal courts. Br. 24-26. And it says that some of those firms have devised a strategy to avoid judicial scrutiny of settlements and fee awards, agreeing to dismiss their suits voluntarily in exchange for disclosures and fee payments made without judicial supervision. *Id.* 26-27.

Notably, the Delaware Court of Chancery, whose decision the Chamber otherwise embraces, does not share the Chamber's dark view of this practice. Indeed, in *Trulia*, the court called mootness dismissals the "preferred scenario" and a "logical and sensible framework for concluding the litigation." 129 A.3d at 897. It reasoned that

> [a]fter being afforded some discovery to probe the merits of a fiduciary challenge to the substance of the board's decision to approve the transaction in question, plaintiffs can exit the litigation without needing to expend additional resources (or causing the Court and other parties to expend further resources) on dismissal motion practice after the transaction has closed. Although defendants will not have obtained a formal release, the filing of a stipulation of dismissal likely represents the end of fiduciary challenges over the transaction as a practical matter.

Id. at 897-98. At the same time, the Court explained that even when the parties negotiate attorney's fees without the court's supervision, there remains two tiers of protection against abusive dismissal settlements. First, the settlement obviously cannot occur without the agreement of the defendant's corporate officers. *Id.* at 898. Second, under Delaware corporation laws, those officers are permitted to enter such settlements only if they provide notice to stockholders "to protect against 'the risk of buy off' of plaintiffs' counsel." *Ibid.* Shareholders are then entitled to object to the expenditure, in court if necessary. *Ibid.* With those protections "against potential abuses in the private resolution of fee demands for mooted representative actions," *Trulia* affirmed "the propriety of proceeding in that fashion." *Ibid.*

That said, to the extent that such settlements represent a pattern of some law firms filing meritless litigation in the hopes of extracting a quick settlement that benefits only themselves, amici, as institutional investors, condemn it as contrary to the interests of shareholders and inconsistent with ethical legal practice. But the problem described does not warrant the Chamber's proposed response, for several reasons.

1. The Chamber Documents, At Best, A Small – And Quickly Diminishing – Number Of Concerning Cases.

While frivolous litigation should never be condoned, it cannot ever be completely avoided. The mere existence of some such litigation cannot, therefore, be grounds in itself for precluding all lawsuits to enforce statutory provisions that embody

critical protections for the investing public and our financial markets. And in this case, even accepting the most sinister explanation of the Chamber's data, the brief describes a small handful of firms extracting relatively small fees with relatively little disruption of firms' merger plans. Whether that pattern of litigation will persist is very uncertain, and there are strong reasons to believe it is unsustainable.

Start with the numbers. The Chamber does not identify any problematic filings between Section 14's enactment in 1968 and 2003.[13] Between 2003 and 2015, it identifies an average of fewer than three suspicious cases per year. *See* Chamber Br. App. 5a-8a.[14] It then cites 13 cases in 2016 (the year of the *Trulia* decision), spiking to 41 cases in 2017, before falling substantially to 29 cases in 2018. *Id.* 1a-5a. In the first two months of 2019, it found a single case. *Id.* 1a. If that trend continues, the Court should expect only six such cases this year.

To be clear, amici condemn the imposition of even minimal costs through frivolous litigation. But the Chamber asks the Court to compare the costs and benefits of private enforcement of Section 14(e). Br. 19. The substantial benefits of private enforcement – including settlements providing hundreds of millions

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[13] *See* Chamber Br. App. 8a-9a (identifying cases in which injunctive relief was requested but the case was dismissed without any significant docket activity occurring, listing first such case as arising in 2003). Although the database the Chamber used contains data stretching back to 1996, it cites no problematic cases for the first seven years covered by the data set.

[14] That is, 32 cases over the course of 13 years.

of dollars in relief to investors, the deterrent effect that protects all shareholders and the integrity of national financial markets, and the reduced need to expand SEC enforcement resources – vastly surpass the modest costs the Chamber purports to identify. The Chamber estimates that its suspected strike suits settled for $265,000 in attorney's fees on average, in the context of mergers valued in the hundreds of millions (sometimes billions) of dollars. *Id.* 27 (citing *Shifting Tides*, *supra*, at 625). In none of the cases did the plaintiffs obtain a preliminary injunction that could interfere with a merger's closing. Nor is there any indication that any of the cases resulted in any meaningful discovery or other litigation costs or distractions – the Chamber itself emphasizes the emptiness of the dockets. *Id.* 20-21.

In the end, the relief afforded investors in the Allergen settlement alone ($290 million) dwarfs the less than $23 million in attorney's fees the Chamber estimates were extracted in *all* the allegedly meritless suits it identifies in its appendix as occurring since the *Trulia* decision.[15]

2. The Practice The Chamber Describes May Not Be Financially Sustainable.

Even if most voluntary dismissal cases represented illegitimate strike suits, there is reason to believe the practice is unsustainable over the long term.

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[15] The Appendix lists 84 cases filed since 2016 and classified as "Injunctive Relief Case Dismissed Without Significant Activity." *See* Chamber Br. App. 1a-5a; *see also id.* 27 (estimating average settlement of $265,000).

On the Chamber's telling, the "overwhelming majority" of voluntary dismissal cases are brought by just five law firms that have made challenging mergers essential to their business model. Br. 21. Because voluntary dismissals occur without class certification, these firms are unable to offer defendants a principal benefit provided by court-approved settlements: a release of claims by all class members. The settlement value of the case is therefore predictably lower. *See Shifting Tides*, *supra*, at 626 (finding that mootness fees "are below the medians for disclosure-only settlements").

As a result, the Chamber's principal authority on mootness fees found that "it is questionable whether [mootness fees] are sufficient to sustain a litigation practice in this area." *Shifting Tides*, *supra*, at 626. That is, "mootness fees may not provide an adequate financial payoff to warrant the filing of low-value cases in the long term, despite the current sharp uptick of cases." *Id.* at 639.

Indeed, as noted earlier, the number of voluntary dismissals has already started falling off substantially. What may prove to be a temporary blip in litigation practice is no basis for making long-term decisions about the future of Section 14(e) enforcement.

C. Voluntary Dismissal Settlements Exist Only Because Defendants Are Willing To Agree To Them.

If, despite these indications, an intolerable number of obviously meritless suits continue to be filed, it will be because defendants have elected to tolerate, even encourage, them by failing to engage in any meaningful resistance.

As discussed, defendants have ample means for eliminating frivolous litigation at an early stage. This has led some litigators to observe that although the "*Trulia* decision has incentivized plaintiffs and their lawyers to seek more favorable jurisdictions," they "should not expect success in federal court." Abby F. Rudzin et al., *From Chancery Court to Federal Court: The Obstacles to a Post-*Trulia *Migration*, 50 Rev. Sec. & Commodities Reg. 41, 46 (2017) (*Obstacles*).

That is, plaintiffs with weak cases should not expect success if defendants put up a fight. But a principal feature of the practice the Chamber describes is defendants' failure even to attempt a motion to dismiss before agreeing to settle these cases. These defendants cannot claim that a quick settlement was needed to avoid the prospect of a preliminary injunction, *see* Chamber Br. 23, because defendants are settling the cases before the plaintiffs even ask for a preliminary injunction, *id.* 21 & n.7. "This puts plaintiffs — whose primary leverage is their ability to threaten the merger's timing — at a significant disadvantage because the merger may proceed while the motion to dismiss is pending." *Obstacles*, *supra*, at 45. Nor can defendants claim that the threat of discovery costs coerced them – under the PSLRA, the filing of a motion to dismiss automatically stays discovery absent a court order finding a special need for it. *See* 15 U.S.C. § 78u-4(b)(3)(B).

At the same time, fee awards to plaintiffs' counsel avoid judicial scrutiny only because defendants have agreed to pay them out of court. Until the past few years, defendants seemingly insisted on settlements and fee awards that required judicial approval. *See* Chamber Br. 24-25.

Finally, if defendants are paying fees sufficient to make the enterprise profitable, they are financing the very litigation they claim to need protection from. The Chamber's members cannot fairly insist that they need radical changes to our system of enforcing securities laws to protect themselves from a stratagem they already have the power to defeat but have chosen instead to facilitate.

D. None Of The Authorities The Chamber Cites, Including The Chamber's Own Prior Reports, Has Suggested That The Solution To Any Problem With Merger Litigation Is The Elimination Of Private Enforcement.

Notably, none of the authorities the Chamber relies upon to establish that there is an alleged problem with vexatious merger litigation urge the complete elimination of private enforcement in this area, much less the elimination of the Section 14(e) private right of action in particular. This includes, most remarkably, the Chamber's own reports.

The authors of the *Shifting Tides* study, for example, emphasize that "caution is warranted until the full impact of the recent changes" become clear. *Shifting Tides*, *supra*, at 639. For example, they resist even the far more modest suggestion of imposing a fee-shifting regime in Delaware courts, warning that it could deter meritorious litigation and thereby "inadvertently cut off valuable shareholder monitoring efforts" that benefit investors and "provide courts with the opportunity to lay out the rules of the road for deals." *Id.* at 636. Eliminating private litigation, they warn, would "eliminate valuable cases that generate

compensation to injured shareholders and deter future managerial wrongdoing." *Id.* at 637. At the same time, they predict that other responses may adequately address the problem the Chamber perceives: "Federal courts may treat disclosure claims and settlements with similar skepticism to that shown by the *Trulia* decision. And mootness fees may not provide an adequate financial payoff to warrant the filing of low-value cases in the long term, despite the current sharp uptick of cases." *Id.* at 639.

The Chamber's own public reports investigating the alleged problem of strike suits in merger litigation likewise never suggest that the appropriate response is the elimination of private enforcement. *See* U.S. Chamber Inst. for Legal Reform, *The Trial Lawyers' New Merger Tax* 9 (2012) (suggesting only reforms designed to funnel merger litigation into the jurisdiction of the firm being acquired); *Rising Threat*, *supra*, at 23 (urging Congress to enact reforms to "[d]eter the filing of meritless cases" and "[p]rohibit abusive practices," but not suggesting elimination of private enforcement). The Chamber has recognized that such reforms "will not entirely eliminate the problem of abuse" by private litigants, but until now has been content to "make it much more difficult for trial lawyers to collect their litigation tax." *New Merger Tax*, *supra*, at 10.

III. On The Chamber's Own Account, Eliminating Private Section 14(e) Enforcement Will Do Nothing To Address The Problems It Asserts.

Finally, the Chamber ends its policy argument by emphasizing that eliminating the Section 14(e) private

right of action will not, in fact, materially affect how plaintiffs litigate merger cases on the ground. It says that plaintiffs will still be able to challenge mergers though the uncontested private right of action under Section 10(b). Chamber Br. 27. Of course, those suits would have to allege scienter. *Ibid.* But the Chamber then notes that all of the cases it cites in its appendix were brought in circuits that required scienter for Section 14(e) suits as well. *Ibid.* If the Chamber is right that Section 14(e) litigation can just be refiled under Section 10(b), what is to stop plaintiffs from refiling the same suits under a different provision? And why should anyone expect defendants to begin standing up to allegedly frivolous lawsuits when nothing has changed but a statutory citation in the complaint? The Chamber does not say.[16]

In fact, Section 14(e) does do separate work in at least some circumstances. For example, the Allergan litigation described earlier alleged a form of insider trading that presumably could not be brought under Section 10(b), given this Court's decision in *Chiarella v. United States*, 445 U.S. 222 (1980). That case held that Section 10(b) prohibits trading on nonpublic information about an impending merger offer only if the defendant had a duty of loyalty to the affected shareholders (*e.g.*, because the defendant was a

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[16] To the extent the Chamber implies (*see* Br. 27-28) that injunctive relief to stop a merger would be unavailable under Section 10(b), it cites no authority for that proposition, and amici are aware of none. Nor would it seemingly matter. *See, e.g.*, Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 Vand. L. Rev. 1053, 1058 (2013) (merger settlements driven in significant part by desire to eliminate "potentially large contingent liabilities").

"corporate insider" at the company to be acquired). *See id.* at 232-35; *see also id.* at 233-34 (contrasting Congress's different treatment of tender offers in the Williams Act, Pub. L. No. 90-439, 82 Stat. 454). Thus, the SEC's regulation prohibiting anyone from trading on nonpublic information relating to the tender offer is premised on the Commission's authority under Section 14(e), not Section 10(b). *See* 17 C.F.R. § 240.14e-3(a) (defining prohibited conduct as a "fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act").[17]

In any event, even if the Chamber were right that the vast majority of Section 14(e) claims can be recast as Section 10(b) violations, that would just mean that there is no practical reason for eliminating the longstanding private right of action to enforce Section 14(e), or even to address the question in this case.

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[17] The Chamber also acknowledges that the nontendering shareholder may not have standing under Section 10(b) because they are neither purchasers nor sellers of securities. *See* Br. 28 n.9

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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INTEREST OF AMICI[1]

Amici are scholars in the fields of securities law and private enforcement of federal law who have closely followed this Court's cases about securities regulation and private rights of action. Amici agree with respondents that Section 14(e) of the Securities Exchange Act of 1934 authorizes a private cause of action for negligence. This brief focuses specifically on whether Section 14(e) creates a private right of action—an issue that petitioners and some of their amici have raised belatedly in this litigation. If the Court reaches that question, amici argue that it should affirm.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel contributed money to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

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SUMMARY OF ARGUMENT

This Court's recent precedents regarding private rights of action emphasize respect for the separation of powers and judicial restraint. Often, these norms have steered the Court away from recognizing a new implied private right of action, or extending an existing one to an entirely new circumstance. The same considerations, however, dictate a different result with respect to private rights of action that are well-established by judicial precedent. Where Congress contemplated a private right of action in the first instance, courts have uniformly recognized one for decades, and Congress has legislated against that backdrop without abrogating those decisions, this

Court has recognized that it would not promote the separation of powers or judicial restraint to upend the status quo. Indeed, it would be profoundly disruptive.

These considerations apply with full force to established private rights of action under the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (15 U.S.C. § 78a *et seq.*)—including the rights to enforce Sections 10(b), 14(a), 14(e), and their implementing rules. In this case, to the extent the Court is inclined to reach the issue of the implied private right of action, the Court should recognize that such well-established causes of action continue to play an important role in securities regulation, and uphold the private right of action to enforce Section 14(e).

ARGUMENT

Everybody agrees that on a prospective basis it would be better for Congress to speak expressly if it wishes to create a new cause of action. Simultaneously, however, nobody can deny that it would be extremely disruptive for federal courts—having recognized implied rights of action for decades, and having induced Congress to expect that such remedies would be available to injured Americans—to begin overruling all of those decisions in an effort to clean the doctrinal slate. In the short term, grave violations of federal law would occur without any remedy, and it is doubtful whether Congress would ever be able to undo all of the damage.

These concerns about fairness, justice, and stability in the law have correctly prompted this Court to take a cautious and balanced approach to private rights of action. This Court's decisions reflect real reluctance to create new private rights of action, or to

extend existing ones—but also a firm commitment to maintain existing, well-established private rights of action against unfounded challenges. This Court should follow that approach, and in fact nobody seriously argues otherwise.

Taking that as the starting point, the only question in this case is whether the private right of action under Section 14(e) of the Exchange Act, 15 U.S.C. § 78n(e)—which was obviously contemplated by the Congress that enacted the statute, has been uniformly recognized by federal courts since the late 1960s, and has never been modified by Congress since—is the sort of newfangled action that this Court has declined to embrace, or instead the sort of well-established remedy that the Court has consistently maintained. It is clearly the latter, and the Court should therefore affirm.

I. This Court's Precedents Support Maintaining Well-Established Private Rights of Action.

1. There is no doubt that this Court has become less willing to imply new private rights of action. The Court explained why in *Alexander v. Sandoval*, 532 U.S. 275 (2001), which held that there was no private right of action to enforce disparate-impact regulations enacted pursuant to Section 602 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. As the Court recognized, "private rights of action to enforce federal law must be created by Congress," and the "judicial task is to interpret the statute" to determine whether it created a private remedy. 532 U.S. at 286.

In *Sandoval*, the relevant statute (Section 602) authorized federal agencies to issue "rules, regulations,

or orders of general applicability" to enforce Section 601 of the statute, which by its terms prohibited only intentional discrimination. *See* 532 U.S. at 288 (quoting 42 U.S.C. § 2000d-1). The Court determined that this language did not create rights or even regulate conduct; in fact, the language suggested that public enforcement was the proper way to enforce the statute. *Id.* at 289-90. Section 602 was therefore insufficient to authorize a new private right of action for disparate impact claims.

The Court acknowledged, however, that courts should recognize implied private rights of action in at least two contexts. First, the Court indicated that existing implied private rights of action should not be revisited. For example, the Court held that the implied private right of action to enforce Section 601 was "beyond dispute." *Sandoval*, 532 U.S. at 280. As support, the Court noted that it had acknowledged this right of action in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and that subsequent legislation—which effectively "ratified" the private right of action, even though it did not codify it—had been enacted against that backdrop. 532 U.S. at 279-80.

Second, the Court recognized that when Congress enacts or reenacts statutory text "that courts had previously interpreted to create a private right of action," courts can consult that context when interpreting the text, and infer that Congress intended the statute to create a private right of action. *Sandoval*, 532 U.S. at 288. The Court cited two relevant examples. First, in *Cannon*, the Court observed that Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, "was patterned after Title VI of the Civil Rights Act of

1964," which "had already been construed" by the lower courts "as creating a private remedy." 441 U.S. at 694, 696. The Court reasoned that it was "always appropriate to assume that our elected representatives, like other citizens, know the law"—and to conclude that Congress would have "expected its enactment to be interpreted in conformity" with judicial precedents that formed the "contemporary legal context" around the 1972 statute. *Id.* at 696-97, 699. This was so even under "the strict approach followed in our recent cases" regarding implied rights of action. *Id.* at 698.

The Court's second example was *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982), which upheld an implied private right of action to enforce the Commodity Exchange Act (CEA), ch. 369, 42 Stat. 998 (7 U.S.C. § 1 *et seq.*). In *Merrill Lynch*, the Court explained that "[i]n determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue . . . we must examine Congress' perception of the law that it was shaping or reshaping." 456 U.S. at 378. When Congress overhauled the CEA in 1974, an implied private right of action was already "part of the 'contemporary legal context'" because it had been recognized by many lower courts, and this Court had "assumed that the remedy was available" *Id.* at 380, 381. Congress did not codify this private right of action, but it did not eliminate the relevant statutory language either. The Court held that "[i]n that context, the fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied

a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy." *Id.* at 381-82.

In these situations, the Court held that it was proper for courts to presume that Congress understood the text it was enacting to create a private right of action, and that it would therefore thwart Congress's intent for a court to interpret the statute to reach the opposite result.

2. In the years since *Sandoval*, the Court has generally been reluctant to infer implied private rights of action. There have, however, been notable exceptions that prove the doctrine of implied private rights of action remains an important feature of federal law.

In *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 171 (2005), the Court held that the implied private right of action to redress discrimination on the basis of sex under Title IX (recognized in *Cannon*) extended to retaliation claims. The Court reasoned that "Congress enacted Title IX just three years after" *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which held that the prohibition of racial discrimination in 42 U.S.C. § 1982 included a prohibition against retaliation. 544 U.S. at 176. The Court thus concluded that *Sullivan* "provides a valuable context for understanding" Title IX, and that Congress would have "expected its enactment of Title IX to be interpreted in conformity with" that decision. *Ibid.* (quotation marks and alterations omitted). Because *Sullivan* had interpreted discrimination to encompass retaliation, the Court in *Jackson* held that Title IX's prohibition of discrimination did, too. The Court rejected the

argument that its decision was inconsistent with *Sandoval*, reasoning that its conclusion followed from the "statute's text" and Congress's intent—not freewheeling judicial policymaking. *Id.* at 178.

In *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), the Court, in a 7-2 decision, reached the same result with respect to 42 U.S.C. § 1981. The Court explained that even though Section 1981 did not mention retaliation, the statute had historically been interpreted to be consistent with Section 1982—which the Court in *Sullivan* had found to prohibit retaliation. The Court also noted that "since 1991, the lower courts have uniformly interpreted § 1981 as encompassing retaliation actions." 553 U.S. at 451. The Court thus reasoned that considerations of statutory *stare decisis* supported finding a cause of action for retaliation in Section 1981 as well:

> *Sullivan*, as interpreted and relied upon by *Jackson*, as well as the long line of related cases where we construe §§ 1981 and 1982 similarly, lead us to conclude that the view that § 1981 encompasses retaliation claims is indeed well embedded in the law. That being so, considerations of *stare decisis* strongly support our adherence to that view. And those considerations impose a considerable burden upon those who would seek a different interpretation that would necessarily unsettle many Court precedents.

Id. at 451-52. The Court also rejected the argument that in the years since *Sullivan*, the Court's approach to statutory interpretation had veered toward textualism and away from the sort of purposive

analysis utilized in *Sullivan* itself. The Court explained that even if this was true, it did not matter:

> [E]ven were we to posit for argument's sake that changes in interpretive approach take place from time to time, we could not agree that the existence of such a change would justify reexamination of well-established prior law. Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.

Id. at 457. Importantly, the Court reached these conclusions even though it had never previously recognized a private right of action for retaliation under Section 1981. It was enough that the lower courts had done so, and that this Court's other decisions interpreted Section 1981 consistently with Section 1982.

These recent cases stand for the proposition that, even after *Sandoval*, the Court should not hesitate to imply a private right of action when judicial precedent interpreting analogous statutes supports that result. In these situations, it is apparent that Congress would have understood the text it was enacting to create a private right of action.

3. In addition to these cases, which have actually extended private rights of action, the Court has also maintained well-established private rights of action. The best examples are private rights of action under the Exchange Act, such as the right under Section

10(b) (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5), and also under Section 14(a) (15 U.S.C. § 78n(a)) and Rule 14a-9 (17 C.F.R. § 240.14a-9). These are discussed in greater detail in Part II, *infra*. But those are not the only examples. In fact, the Court has generally refrained from overruling the holdings of any of its old private-right-of-action cases, even though it has stepped away from their reasoning.

For present purposes, the key point is that the Court's maintenance of existing private rights of action is fully consistent with its recent precedents. The Court has explained that its approach to private rights of action is rooted in the separation of powers and judicial restraint. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). These are laudable goals, and maintaining existing private rights of action advances them by preserving the predictable status quo and allowing Congress to modify it if necessary. An aggressive effort to eliminate existing private rights of action, by contrast, would frustrate Congress's settled expectations and either result in gaps in Congress's laws, or force a flurry of unnecessary legislative activity.

Maintaining existing private rights of action also makes sense for all of the reasons that *stare decisis*—and especially statutory *stare decisis*—requires the Court to stay the course even if it might decide a case differently on a blank slate. It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting

Payne v. Tennessee, 501 U.S. 808, 827 (1991)). And it leaves the right to act where it belongs—with Congress—which "can correct any mistake it sees." *Ibid.* Importantly, "[t]hat is true . . . whether [the Court's prior] decision focused only on statutory text or also relied . . . on the policies and purposes animating the law" and indeed, "even when a decision has announced a 'judicially created doctrine' designed to implement a federal statute." *Ibid.* (citation omitted).

II. Private Rights of Action Under the Exchange Act, Including the Right to Sue Under Section 14(e), Are Well-Established and Should Be Maintained.

This Court's approach strongly supports leaving existing private rights of action under the Exchange Act—including the private right of action under Section 14(e)—intact. Implied private rights of action under the Exchange Act have been recognized for decades. Even as this Court's precedents have shifted away from implying new private rights of action, the Court has never questioned that these rights continue to play a critically important role in the regulation of securities transactions.[2]

1. Start with the easiest example: nobody disputes that the implied right of action to enforce Section 10(b) and Rule 10b-5—which prohibit fraud in connection

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[2] In addition to Section 14(e), this section discusses Sections 10(b) and 14(a), and their implementing rules. We do this because these sections are closely related, and therefore the most pertinent sections for present purposes. The argument in this brief applies, however, to any well-established private right of action, whether under the securities law or otherwise.

with the purchase and sale of securities—is well-established, and its maintenance is therefore fully consistent with this Court's decision in *Sandoval* and its progeny. Petitioners admit (at 51) that statutory *stare decisis* protects this cause of action, the United States acknowledges (at 30-31) that "such actions serve as an important adjunct to government enforcement suits," and the Chamber of Commerce likewise concedes (at 4) that Rule 10b-5 actions should remain available.

Those admissions are necessary because, for decades, this Court has acknowledged this private right of action. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) ("Although section 10(b) does not create an express private cause of action, we have long recognized an implied private cause of action to enforce the provision and its implementing regulation."); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011); *Stoneridge*, 552 U.S. at 165 (describing the "implied right of action" as "a prominent feature of federal securities regulation"); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (stating that because "a private right of action under § 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years," the "existence of this implied remedy is simply beyond peradventure"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (noting that the Court had followed the "overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist"); *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) ("It is now

established that a private right of action is implied under §10(b)").

This private right of action has also been ratified by Congress. In *Stoneridge*, this Court acknowledged that by enacting the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, Congress "ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action." 552 U.S. at 165. In *Herman & MacLean*, it applied a similar analysis to the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97. *See* 459 U.S. at 385-86 ("In light of this well-established judicial interpretation [permitting Section 10(b) actions even when express remedies were available under other provisions], Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action."). That analysis echoes the reasoning of *Sandoval*, which recognized that Congress ratified *Cannon* by legislating without overturning it, and of *Merrill Lynch*, which held that Congress's decision to overhaul the CEA without repealing legislation that had been construed to create a private right of action constituted strong evidence of an intent to preserve that right of action.

Indeed, in its recent decision in *Halliburton*, the Court not only reaffirmed the existence of the Section 10(b) and Rule 10b-5 private right of action, it held that principles of statutory *stare decisis* compelled upholding the existing scope of that cause of action—specifically the presumption of reliance. *See* 573 U.S. at 274-75. The Court thus distinguished between expansions of the private right of action—which are disfavored under current doctrine—and the maintenance of such a cause of action, which is

strongly favored under this Court's precedents. *Id.* at 275-77.

2. Similarly, the private right of action to enforce Section 14(a) and Rule 14a-9, recognized by this Court in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), is well-established and remains vital today. Section 14(a) makes it unlawful for any person to solicit or permit the use of his or her name to solicit a proxy, consent, or authorization in respect of any security in violation of SEC rules. Rule 14a-9 implements Section 14(a) by providing that:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. § 240.14a-9(a).

Although much of *Borak*'s reasoning has been rejected, this Court has never overruled its holding—and has in fact repeatedly reaffirmed the existence of this private right of action. *See Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095 (1991) (discussing elements of a private Section 14(a) cause of action);

TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 441 (1976) (same); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 377 (1970) (same); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 171 (1994) (acknowledging private right of action to enforce Section 14(a)); *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 299 n.3 (1993) (Thomas, J., dissenting) (same); *Herman & MacLean*, 459 U.S. at 380 n.9 (same); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979) (same); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 25 (1977) (same); *Sec. Inv'r Prot. Corp. v. Barbour*, 421 U.S. 412, 423 (1975) (same).

Congress similarly has not sought to abrogate *Borak*. On the contrary, it has repeatedly amended the statutory scheme without doing so. For example, the PSLRA—which "ratified" the implied private right of action under Section 10(b)—applies to actions under Section 14(a) and Rule 14a-9 as well. *See, e.g., N.Y.C. Emps.' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010), *overruled on other grounds by Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012) (en banc); *Little Gem Life Scis. LLC v. Orphan Med., Inc.*, 537 F.3d 913, 916 (8th Cir. 2008); *Bond Opportunity Fund v. Unilab Corp.*, 87 F. App'x 772, 773 (2d Cir. 2004). The legislative history of the PSLRA likewise noted that, like actions under Section 10(b), private causes of action under Section 14(a) "have long been recognized as a necessary supplement to actions brought by the Commission and as an essential tool in the enforcement of federal securities laws." S. Rep. No. 104-98, at 37 (1995) (additional views of Sens. Sarbanes, Bryan, and Boxer) (quoting former SEC

Chair Richard Breeden) (internal quotation marks omitted).

This private right of action thus exhibits the same qualities as the Section 10(b) and Rule 10b-5 action: it has long been recognized by the courts, and Congress has not abrogated it despite repeatedly amending the legislative scheme.

3. These arguments apply fully to the private right of action to enforce Section 14(e). As explained by respondents, the point of Section 14(e) was to complement Section 14(a)'s regulation of proxy solicitations by implementing similar rules regulating cash tender offers.

Section 14(e)'s text resembles Rule 10b-5 and Rule 14a-9, modified to apply to tender offers. At the time of its enactment, as part of the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968), it provided:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C. § 78n(e) (Supp. IV 1968).

In 1968, Congress would have intended this language to create a private right of action. Section 14(e) was "modeled on the antifraud provisions of

§ 10(b) of the Act and Rule 10b-5," *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10 (1985), and by 1968, the private right of action under Section 10(b) and Rule 10b-5 was already clearly established. *See Blue Chip Stamps*, 421 U.S. at 730 (explaining that the cause of action to enforce Section 10(b) and Rule 10b-5 was first recognized in 1946, and consistently thereafter). Section 14(e) was also supposed to complement Section 14(a)—and it was enacted four years after this Court decided *Borak*, recognizing the private right of action for Section 14(a) and Rule 14a-9. *Cf. Jackson*, 544 U.S. at 176-77 (finding it important that Title IX was enacted three years after *Sullivan*). Thus, Congress would have believed that Section 14(e) gave rise to a private cause of action, too. *See Sandoval*, 532 U.S. at 288 (noting that an inference of intent is available when Congress enacts or reenacts the same "statutory text that courts had previously interpreted to create a private right of action"); *Cannon*, 441 U.S. at 694 (finding it significant that Title IX was "patterned after" Title VI, which had a private right of action); *see also CBOCS West*, 553 U.S. at 451-52 (maintaining conformity between Section 1981 and Section 1982).

Courts agreed. As with Sections 10(b) and 14(a), lower courts quickly and uniformly recognized a private cause of action to enforce Section 14(e). *See, e.g., Sargent v. Genesco, Inc.*, 492 F.2d 750, 769 (5th Cir. 1974) ("Although section 14(e) does not expressly provide for a private right of action, courts have uniformly implied one."); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 596 n.20 (5th Cir. 1974) (following the "overwhelming weight of authority" holding that "a private right of action may be inferred from Section

14(e)"). While courts debated the precise contours of the cause of action, none found that it did not exist.

While this Court has not yet formally recognized a cause of action under Section 14(e), it has strongly suggested that an implied private right of action for harmed investors does exist. In *Piper*, the Court considered whether a company making a tender offer had standing to bring claims under Section 14(e). 430 U.S. at 42. The Court explained that "where congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute." *Id.* at 25. And while the Court found that unsuccessful tender offerors were not part of the particular class intended to be protected by Section 14(e), following a lengthy review of the legislative history of Section 14(e), as well as the Court's related jurisprudence holding that Section 14(a) supported an implied private right of action for injured investors, the Court concluded that the "legislative history thus shows that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." *Id.* at 35; *see also Schreiber*, 472 U.S. at 8, 10 (analogizing Section 14(e) to Section 10(b), and holding that private cause of action therefore did not apply absent a misrepresentation or omission). The Court's analysis in *Piper* therefore directly indicates that an implied right of action under Section 14(e) was intended to be available to injured investors.

Thus while the Court nominally reserved any opinion about whether the private right of action extends to shareholders, 430 U.S. at 42 n.28, viewed in context, this statement is a clear suggestion that the

private right of action exists: the Court included it to clarify that its holding did not extend to shareholder-offerees, and thereby blunt the force of the dissent. *See ibid.* The dissent, in turn, had observed that "[n]o one seriously questions the premise that Congress implicitly created a private right of action when it enacted § 14(e) in 1968," nor "that the members of the class which Congress was especially interested in protecting may invoke that private remedy and, further, that the shareholders of a target corporation are members of that class." *Id.* at 55 (Stevens, J., dissenting). The majority never quarreled with any of that—in fact, it sought to assuage the concern with its footnote.

Against the backdrop of these decisions, Congress repeatedly amended the Exchange Act—but left the pertinent language in Section 14(e) untouched. In 1970, after the lower courts had already recognized a private right of action, Congress added explicit rulemaking authority to Section 14(e). *See* Pub. L. No. 91-567, § 5, 84 Stat. 1497, 1497-98 (1970). That amendment substantially strengthened the statute—and it did not modify the preexisting text, which Congress understood to create a private right of action. This is "evidence that Congress affirmatively intended to preserve that remedy." *Merrill Lynch*, 456 U.S. at 381-82. Congress also did not modify the private right of action when it made substantial amendments to the Exchange Act in 1975. *See supra* p.13. The PSLRA also applies to actions under Section 14(e). *See, e.g.*, *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1167 (9th Cir. 2009); *In re Dig. Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004). Thus, in the same way that Congress ratified the private right of action under Section 10(b),

it ratified the private right of action under Section 14(e). *See Stoneridge*, 552 U.S. at 165.

Petitioners and their amici argue that Section 14(e) is not entitled to the same treatment as causes of action under Sections 10(b) and 14(a) because *this Court* has never recognized a cause of action under Section 14(e). But that is not the standard this Court has laid out and adhered to. The lower courts have uniformly recognized this right of action for decades. Just as Congress is presumed to understand the common law and legislate against that backdrop, *see, e.g.*, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991), it is presumed to comprehend a consensus among the lower federal courts. Indeed, the Court said precisely that in *Cannon*, 441 U.S. at 696-98, and in *Merrill Lynch*, 456 U.S. at 380—both cited in *Sandoval* as examples where context mattered, 532 U.S. at 288. In *CBOCS West*, too, this Court placed weight on the lower courts' consensus. 553 U.S. at 451. In each of these cases, even though this Court had not previously recognized a private right of action, it held that lower court decisions informed Congress's understanding of the text it was enacting.

To the extent this Court's precedents are instructive, all of the relevant precedents support maintaining the Section 14(e) cause of action. This Court has recognized implied causes of action under closely analogous provisions: Sections 10(b) and 14(a), and their implementing rules. In *CBOCS West*, the Court extended the cause of action under Section 1981 to encompass retaliation claims because of 1960s-era precedent finding a similar cause of action under Section 1982, determining that the result was compelled by statutory *stare decisis*. *See* 553 U.S. at

451-52. The analogy between Section 14(e) and other well-established causes of action under the Exchange Act are at least as strong, and so this Court's cases finding private causes of action under Sections 10(b) and 14(a) should have the same force here.

Finally, it does not matter, for present purposes, that lower courts initially interpreted Section 14(e) to require scienter, as opposed to negligence. As respondents explained in the brief in opposition, these courts did not analyze Section 14(e)'s first clause, and so there was no consensus that this clause required scienter. BIO 7. In any event, as this Court has recognized, the scope of an existing private right of action is a matter of statutory interpretation that turns on the meaning of the text Congress enacted. *See Jackson*, 544 U.S. at 178. That text encompasses negligent misrepresentations, Resp. Br. 9-25, and the Court should construe the statute accordingly.

4. In sum, the maintenance of private causes of action under the Exchange Act is fully consistent with this Court's precedents. When, as here, a private right of action has been in place for 50 years, it would upset settled expectations and frustrate congressional intent to eliminate it. Of course, as with any statutory question, Congress remains free to modify the scope or availability of any private right of action as it sees fit. This Court should leave the job of altering the status quo to Congress.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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In The Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Rick Fleming, Investor Advocate, SEC, Address at PLI's The SEC Speaks in 2018: *Mandatory Arbitration: An Illusory Remedy for Public Company Shareholders* (Feb. 24, 2018)..... 32, 33

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H.R. REP. No. 90-1711 (1968) 13

Robert J. Jackson Jr., Comm'r, SEC, Address at CECP CEO Investor Forum: *Keeping Shareholders on the Beat: A Call for a Considered Conversation About Mandatory Arbitration* (Feb. 26, 2018) 32

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Joseph D. Reid, *Senate Bill 510 and the Cash Tender Offer*, 14 WAYNE L. REV. 568 (1968) 28

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INTEREST OF AMICUS CURIAE[1]

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud or other forms of unlawful conduct in the offer and sale of securities.

NASAA's U.S. members are responsible for regulating transactions under state securities laws, commonly known as "Blue Sky Laws." *See generally* 1 LOUIS LOSS ET AL., SECURITIES REGULATION 55–251 (5th ed. 2014). These activities include registering local securities offerings; licensing and examining broker-dealers and investment advisers who sell securities or provide investment advice; and initiating enforcement actions to combat fraud and other violations of state securities laws. One of NASAA's goals is to foster greater uniformity across state and federal securities laws, though the overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud or other unlawful conduct in the securities markets.

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[1] Counsel of record for all parties consented to the filing of the brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

NASAA supports the work of its members and the investing public by, among other things, promulgating model rules, providing training opportunities, coordinating multi-state enforcement actions and examinations, and commenting on proposed legislation and rulemakings. NASAA also offers its legal analysis and policy perspective to state and federal courts as amicus curiae in cases involving the interpretation of state and federal securities laws.

NASAA and its members have a strong interest in this case, which raises important questions of investor protection and the ability of shareholders to initiate remedial actions—a crucial component of the securities enforcement framework—and thereby deter and recover for harm caused by false or misleading statements that influenced their decisions about tendering shares. Eliminating the long-established private enforcement mechanism would reopen the significant regulatory gap Congress sought to close between takeovers-by-proxy and takeovers-by-tender-offer, to the detriment of the investing public.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than five decades, it has been settled in the lower courts, acknowledged by scholars, implicitly accepted by this Court, and condoned by Congress that Section 14(e) of the Williams Act, 15 U.S.C. § 78n(e), confers a private remedy on shareholders injured by those who violate its prohibitions. Affirming this private right of action under Section 14(e) also accords with the private right of action permitting similarly-wronged investors to recover money damages for false

or misleading statements made in the context of proxy solicitations under Section 14(a), a right that was recognized by this Court in *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), four years before the Williams Act's passage. Section 14(e) reflects Congress's intent that the regulation of tender offers be in parity with that governing proxies. And the text of Section 14(e)'s first clause unambiguously imposes the same culpability standard as under Section 14(a): negligence. The Ninth Circuit's close reading of the plain meaning of the statute's first clause did not create or extend a private right of action; it just recognized the unambiguous scope of the private right that Congress intended more than 50 years ago.

I. Addressing what was effectively a question of first impression in the courts of appeals, the Ninth Circuit correctly ruled that the first operative clause of Section 14(e)—echoing language that this Court has interpreted to require only negligence in other securities law statutes—was devoid of any language requiring knowing misconduct. Standing in contrast to the second clause, which uses the phrase "fraudulent, deceptive, or manipulative acts or practices," the first clause prohibits "any untrue statement of a material fact" or material omission, terms that sound in negligence only. No other court of appeals has staked out a considered opposing position. Rather, previous appellate rulings interpreted Section 14(e) to require scienter before guiding precedents from this Court read identical language elsewhere to cover negligence; addressed second-clause cases based on allegations of only knowing misconduct; did not carefully unpack the

disjunctive operative clauses in Section 14(e); or all of the above.

When Section 14(e)'s grammatical structure is parsed, the first clause facially prohibits negligent untruthful statements or material omissions. The plain text of Section 14(e) imposes no "uniform culpability requirement" for its disparate clauses. *See Aaron v. SEC*, 446 U.S. 680, 697 (1980). And the negligence standard not only conforms to the dictates of Congress's word choice and grammar, it mirrors the negligence standard that courts have been applying for decades under Section 14(a) in the proxy context. There is no obvious reason for adopting a different liability standard under Section 14(e), and every reason not to.

II. As to the already-settled question whether a private right exists, this Court should decline to address a question that was expressly disclaimed in the courts below. Raising an issue for the first time on one page of a rehearing petition is too little too late to preserve a question for this Court's review. But if the Court does strain to reach the issue, now is the time to affirm explicitly what has long been accepted without need for elaboration: Congress intended there to be a remedy under Section 14(e) for target-company shareholders deprived of the full disclosures and accurate information for tender offers promised by the Williams Act. Affirming a negligence standard for the statute's first clause, as the text demands, does nothing to alter this private right analysis and honors Congress's demonstrated intent in the Williams Act.

The will of the enacting Congress is what matters when discerning legislative intent. And Congress would have expected the text that it enacted in 1968, a mere four years after this Court's decision in *Borak*, to confer a private right of action. Legislative history for the Williams Act's 1970 amendments confirms as much, showing that Congress was favorably aware that courts were already permitting private rights of action under Section 14(e). The Williams Act's history also confirms that Congress intended proxy contests and tender battles to proceed under similar regimes.

In the proxy sphere, private enforcement of Section 14(a)—where failure to provide mandatory disclosures is protected by a negligence standard—provides a necessary and welcome complement to public enforcement. The same holds true of Section 14(e) in the tender context. Both are narrowly-tailored prohibitions on disclosure failures in particularized contexts where Congress intended shareholders to have complete and accurate information so markets could function properly and investors would be adequately protected.

Far from being a disruptive force, private securities actions instead further Congress's statutory purpose to foster regulatory compliance and well-functioning markets. As this Court, federal regulators, and NASAA's state regulator members all agree, such private actions are "crucial to the integrity of the domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 n.4 (2007).

ARGUMENT

I. All Tools Of Statutory Construction Confirm That Section 14(e)'s First Clause Sounds In Negligence.

The Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968), aimed to "insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information." *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8–11 (1985) (quoting *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975)). By doing so it closed "a rather large gap in the securities statutes," *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 27 (1977) (citation omitted), mandating full disclosure of all material facts when takeovers were attempted by tender offer, as was already required for takeovers attempted by proxy solicitation.

The Ninth Circuit's holding that Section 14(e)'s first clause can be satisfied through a negligence standard—the first of any court of appeals to carefully parse the statute—is dictated by Section 14(e)'s text. This Court has recognized as much in similar contexts, and the Solicitor General agrees. *See* SG Br. 13–26. The plain meaning of Section 14(e) thus resolves the matter.

But there is more. The Williams Act's legislative history shows Congress intended to prohibit negligent failures to fully disclose material information during tender offers, in service of the Act's promise that complete and accurate information be provided to investors. And the settled history of the parallel

standards in the proxy solicitation context confirm as much.

A. The Ninth Circuit's Close Reading of Section 14(e)'s First Clause Is Correct.

The starting point in any dispute about the proper interpretation of a statute is the text itself. If the words and logic yield an interpretation that is unambiguous, the Court's inquiry ends. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). Legislative history and public policy considerations can also be relevant if a statute has more than one valid interpretation. *Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81, 93 (2007). Here, as the United States agrees, all statutory construction tools point to one answer: the first clause of Section 14(e) sounds in negligence.

Section 14(e)'s first sentence contains two separate operative prohibitions, divided by the disjunctive "or." Its first substantive clause makes it "unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." 15 U.S.C. § 78n(e). The second clause, in turn, "makes it unlawful for any person . . . to engage in any fraudulent, deceptive, or manipulative acts or practices." *Id.* Both govern conduct "in connection with any tender offer . . . ." *Id.*

Section 14(e)'s second sentence, added in 1970, provides the Securities and Exchange Commission ("SEC") with explicit rulemaking authority to define the fraudulent, deceptive or manipulative practices described in Section 14(e)'s second clause. *See* Pub. L. No. 91-567, § 5, 84 Stat. 1497 (1970). This additional rulemaking authority, applicable only to the second clause, is further confirmation of Congress's intent to treat the two types of prohibitions separately. *See* SG Br. 20–21; Resp. Br. 16–17.

By its terms, the first clause does not suggest scienter is required. And the words "fraudulent, deceptive, or manipulative" appear only in the second clause. 15 U.S.C. § 78n(e). If the second clause had not been included, there would be no reason to infer scienter from Section 14(e)'s prohibitive commands. Basic rules of grammar thus dictate that the inclusion of the second clause, separated by a disjunctive, does not change the meaning of the first clause. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not.").

What is more, Section 14(e) is "nearly identical" to Section 17(a)(2) of the Securities Act of 1933, which this Court has interpreted as not requiring scienter. Pet. App. 12a–13a; *see Aaron*, 446 U.S. at 696–97. As in Section 17(a), the powerful disjunctive "or" removes any "uniform culpability requirement" for the provision. *Id.* at 697. And contrary to Petitioners' hyper-formalistic insistence, Pet. Br. 37, the plain meaning of the text controls, not the presence or absence of numbers to separate grammatically

distinct clauses. It is the statute's "operative text" that shows Congress's intent, not its packaging. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (subchapter headings cannot "substitute for the operative text of the statute"). The separate numbering of Section 17(a) thus merely "reaffirm[ed] conclusions drawn from the words themselves," *United States v. Naftalin*, 441 U.S. 768, 774 & n.5 (1979), and the absence of numbering in Section 14(e) cannot defeat the meaning of the words Congress chose. *See also* Resp. Br. 15.

The plain meaning of Section 14(e) is also corroborated by a comparison to Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, as interpreted by this Court in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). The texts of the relevant subpart of Rule 10b-5 and of Section 14(e) are substantially similar, and—as this Court recognized in *Hochfelder*, 425 U.S. at 212—sound in negligence. To be sure, Rule 10b-5's otherwise natural negligence reading is displaced by the scienter constraint imposed by its authorizing statute, which governs only manipulative or deceptive devices. *Id.* at 213–14. But "[n]o such constraint applies to the interpretation of Section 14(e)." SG Br. 19 (citing *Aaron*, 446 U.S. at 696).[2]

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[2] Petitioners argue that *Hochfelder* also turned on procedural limits available for express private rights sounding in negligence that were not obviously available for implied private actions. Pet. Br. 31-34. But *Hochfelder*'s discussion on this point was brief and provided only additional support for a conclusion the Court acknowledged was "compelled by" text. *See Hochfelder*,

Seemingly opposing results reached by previous appellate courts, *see* Pet. Br. 2–3, do not dispel the force of the Ninth Circuit's careful reading of the statute. To the extent other courts have analyzed the actual text of Section 14(e) at all, their focus was on the language in its second clause, *i.e.*, "fraudulent, deceptive, or manipulative acts or practices." Until the ruling below, no appellate court separately interpreted the meaning of Section 14(e)'s first clause; they either ignored it entirely (because the facts alleged only second-clause misconduct) or disregarded the disjunctive "or" in Section 14(e) and subsumed the first clause within the second. *See SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004) (concluding Section 14(e) requires scienter without analyzing the statutory text when scienter was alleged); *In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004) (same); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 431 (6th Cir. 1980) (holding Section 14(e) requires scienter because "Congress used the words 'fraudulent,' 'deceptive,' and 'manipulative'" in the statute but without parsing the first clause);

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425 U.S. at 214. And the text of the Williams Act requires a different result. Moreover, the sky has not fallen under 14(a), another private right sounding in negligence which Congress intended 14(e) to parallel, *see* Part I.C. This Court's decisions in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015), and *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), recognize that negligence is a workable liability standard for mandatory disclosure violations, while other substantive and procedural limits exist to curtail abuse. *See also* Resp. Br. 17–18. Finally, Congress retains the power to eliminate or procedurally curtail the private right if it so chooses.

Smallwood v. Pearl Brewing Co., 489 F.2d 579, 605–06 (5th Cir. 1974) (holding Section 14(e) requires scienter because the statute uses similar language to SEC Rule 10b-5 with no further textual analysis); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 362 (2d Cir. 1973) (same).

Most of these decisions predated this Court's rulings in *Aaron* (1980) and *Hochfelder* (1976) instructing that "nearly identical" language to Section 14(e) sounded in negligence. Pet. App. 12a. And to the extent these prior decisions elided over the disjunctive "or" in Section 14(e), they erred. *See, e.g.*, *Husky Int'l Elecs. v. Ritz*, 136 S. Ct. 1581 (2016) (reversing an appellate court decision that had failed to give effect to a disjunctive "or" when interpreting a statute).

As for this Court, none of its previous encounters with Section 14(e) grappled with or even commented on the meaning of the statute's first clause. *See United States v. O'Hagan*, 521 U.S. 642, 666–78 (1997) (interpreting the scope of SEC authority to define fraudulent acts under Section 14(e)'s second clause); *Schreiber*, 472 U.S. at 12 (interpreting the meaning of "manipulative" within Section 14(e)); *Piper*, 430 U.S. at 22–37 (interpreting and applying Section 14(e) holistically without distinguishing between its first or second clauses and ultimately declining to reach the culpability question). The Ninth Circuit was thus the first appellate court to squarely confront, and carefully read, Section 14(e)'s first clause, and its analysis is the only reading that comports with the statute's plain text.

B. The Legislative History and Purpose of the Williams Act Support a Negligence Standard for Section 14(e)'s First Clause.

Legislative history and the undisputed purpose animating the Williams Act support what the text of Section 14(e)'s first clause makes plain: negligent acts or omissions suffice.

First, the history of amendments to the Williams Act demonstrates that Congress intended the disjunctive in Section 14(e) to separate two distinct prohibitions. Where Congress did *not* want to convey that meaning, it removed the word "or." Specifically, the path to passage of a neighboring provision, Securities Exchange Act Section 13(e)(1), 15 U.S.C. § 78m(e)(1) (regarding issuers' ability to buy-up their own shares), shows that Congress was well-aware of the force of the disjunctive "or." That provision's initial draft read as follows (emphasis added):

> It shall be unlawful for an issuer, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest ***or*** for the protection of investors ***or*** in order to prevent such acts and practices as are fraudulent, deceptive or manipulative, to purchase any equity security which it has issued . . . .

See Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Sec. of the S. Comm. on Banking & Currency, 90th Cong. 8–9 (1967) (emphasis

added) (hereinafter "S. 510 Hearings"). During hearings on the Williams Act and in a written statement, the Chairman of the SEC noted that he interpreted this language as providing SEC rulemaking authority to reach conduct other than potentially fraudulent, deceptive or manipulative practices. *See id.* at 27, 38 (statements of SEC Chairman Manuel F. Cohen). That interpretation necessarily read the disjunctive "or" to mean that each rulemaking clause had separate operative force.

After this was pointed out, though, Congress removed the disjunctive that would have expanded the scope of Section 13(e)(1). The legislative history does not show precisely when this provision was changed.[3] But the upshot was that the SEC's rulemaking authority under Section 13(e)(1) was limited to potential issuer fraud. The final text of Section 13(e)(1) was unambiguous on this point, limiting the Commission's rulemaking authority to prevention of fraudulent acts:

> It shall be unlawful for an issuer . . . to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means

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[3] This change first appears in a draft of the Williams Act from July 1968. *See* H.R. REP. No. 90-1711, at 5–6 (1968).

> reasonably designed to prevent such acts and practices. . . . .

15 U.S.C. § 78m(e)(1). Had Congress wanted to limit Section 14(e) to fraud, it could have at the very least deleted the disjunctive in Section 14(e), if not rewritten the provision entirely as it did with Section 13(e)(1).

Second, a Senate Report on the Williams Act described Section 14(e) as prohibiting two types of misconduct: "subsection (e) would prohibit *any misstatement or omission of a material fact,* ***or*** *any fraudulent or manipulative acts or practices,* in connection with any tender offer . . . ." S. REP. No. 90-550, at 10 (1967) (emphasis added). The Senate Report, like the underlying text, thus clearly differentiated bare misrepresentations from knowing fraudulent conduct.

Third, congressional amendments two years after enactment of the Williams Act confirm that Congress meant what it said when it included two distinct prohibitions in Section 14(e), one addressed to fraud (clause two) and the other not (clause one). In 1970, Congress added a second sentence to Section 14(e): "The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." *See* Pub. L. No. 91-567, § 5, 84 Stat. 1497–98 (1970).

Congress thus granted the SEC explicit rulemaking authority for the second clause in Section 14(e) but not for the first clause. The SEC did not even

ask for rulemaking authority as to Section 14(e)'s first clause. *See Additional Consumer Protection in Corp. Takeovers and Increasing the Sec. Act Exemptions for Small Businessmen: Hearing on S. 336 and S. 3431 Before the Subcomm. on Sec. of the S. Comm. on Banking & Currency*, 91st Cong. 10–12 (1970) (statements of SEC Chairman Hamer H. Budge) (hereinafter "S. 3431 Hearings"). There was no reason to do so, because the SEC's broad authority to regulate disclosures under the Williams Act was clear, having been expressed no fewer than twelve times in the Act. *See generally* Pub. L. No. 90-439, 82 Stat. 454 (1968); *see also* Resp. Br. 16–17. In contrast, the Williams Act was silent as to the SEC's rulemaking authority to implement the specific antifraud language in the second clause of Section 14(e). This omission evidently concerned the Commission, and so the SEC went back to Congress with a request to close this potential gap. *See* S. 3431 Hearings, at 10–12. For the first clause, however, no additional rulemaking authorization was required to define its scope or make it actionable. *See* SG Br. 20–21. Congress's disparate treatment of the rulemaking provisions for each clause confirms that each clause operates distinctly.

C. A Negligence Standard for Section 14(e) Maintains Parity Between Standards Governing Tender Offers and Proxy Solicitations.

It was important to Congress that proxy contests and tender offer battles—two different ways of achieving takeovers—be governed by similar rules, or, as the Solicitor General puts it, to "harmonize" these

two areas. SG Br. 11–12. A negligence standard for Section 14(e)'s first clause is consistent with the standard for mandatory proxy disclosures under Section 14(a), 15 U.S.C. § 78n(a).

The Williams Act was not created in a vacuum. Congress patterned it off the preexisting proxy standards developed by the SEC under Section 14(a), including Rule 14a-9, because Congress sought a level playing field between proxy contests and tender offer battles. *See Transcript of Proceedings, S. Comm. on Banking & Currency* at 3 (Aug. 10, 1967) (Senator Williams describing his eponymous bill as a "disclosure bill" that will make "equivalent" the standards between proxy contests and tender offer fights); *Transcript of Proceedings, S. Comm. on Banking & Currency* at 10 (Aug. 1, 1967) (Senator Williams explaining that the bill will "conform the tender offer to the 1964 act amendments as to proxy statements"). Congress did not want to favor either tender offers or proxy battles as vehicles for corporate takeover fights; rather, Congress wanted to maintain a regulatory equivalence between the two regimes.

Negligent failures to comply with mandatory disclosure requirements have long been subject to private enforcement in the proxy context. On the way to holding that Section 14(a) conferred a private right of action, this Court explained that the "purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *Borak*, 377 U.S. at 431. *Borak* did not address the state of mind required for a Section 14(a) violation, but courts easily concluded that negligence

was the proper standard for a provision that, like the first clause of Section 14(e), does not reference scienter requirements. A decision by Judge Friendly, *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973), was the first appellate court to rule negligence was the appropriate standard under Section 14(a). A majority of appellate courts have come to agree. *See DeKalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 409 & n.95 (2d Cir. 2016) (collecting cases).[4]

A negligence standard under Section 14(e) maintains Congress's intended equivalence between takeovers-by-proxy and takeovers-by-tender. In both contexts, a negligence standard "reinforce[s] the high duty of care owed by a controlling corporation" to provide complete and accurate information to shareholders, empowering them to make critical decisions in deciding between competing offers for control. *Gerstle*, 478 F.2d at 1300.[5] To read the first

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[4] The Sixth Circuit acknowledged the need for parity in the proxy and tender contexts, in a decades-old case involving third-party liability for accountants (not proxy bidders or tender offerors or controlling corporate officers) that announced a scienter requirement. *See Standard Knitting Mills*, 623 F.2d at 422. In ruling that scienter was required, the Sixth Circuit relied on *Hochfelder*. But the court failed to recognize that *Hochfelder*'s holding was "compelled by" statutory constraints not present in either Section 14(a) or Section 14(e), and also did not separately examine Section 14(e)'s first clause. *Id.* at 428–30.

[5] Upholding a negligence standard under the first clause of Section 14(e) would also be consistent with the standards this Court applies not only to claims by the SEC under Sections 17(a)(2) and 17(a)(3) of the Securities Act, *Aaron*, 446 U.S. at 702, but also to private claims under Section 11 of that Act, 15 U.S.C.

clause of Section 14(e)—countertextually—to require scienter would be to reopen a regulatory gap that Congress thought it definitively closed when it put tender offers on par with proxy solicitations fifty years ago.

II. This Court Should Not Overturn Settled Precedents Upholding An Implied Private Right Of Action Under Section 14(e).

This Court should decline to reach the separate question of whether a private right of action should be implied under Section 14(e) at all. It was not seriously litigated below and mere mention in a rehearing petition is not enough to preserve an issue for this Court's review.

Agreeing to reach an issue expressly conceded below (and therefore never tested by the adversarial process) would encourage future litigants to game the system. But if this Court does choose to engage, it should answer that unnecessary question with the obvious "yes" it deserves. Even today's profound distaste for implying private rights does not justify jettisoning existing ones. And there is more to defend the private right here than consistent judicial practice and congressional acquiescence. Because even if examined anew, the text, structure, history, and

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§ 77k. Section 11 provides a make-whole remedy for shareholders who purchase securities pursuant to a materially false or misleading registration statement and liability can be satisfied through negligence. *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 873 F.3d 85, 130 (2d Cir. 2017).

purpose of the Williams Act also support finding that a private right should lie for Section 14(e).

A. This Court Should Decline To Reach a Question Expressly Disclaimed, and Not Passed Upon, Below.

The Ninth Circuit never reached the question of the existence of an implied right of action under Section 14(e), likely because it was considered settled law, and even more likely because Petitioners conceded the question when pressing their case. *See* BIO 28; Resp. Br. 26–27.

A glancing reference on one page of a rehearing petition, *see* Pet. Br. 43 n.12, does not undo a party's prior concession, and should not suffice to satisfy this Court's "pressed or passed upon" rule. *Youakim v. Miller*, 425 U.S. 231, 235 (1976). Engaging with this late-arriving question would create perverse incentives for parties to save their best for last, allowing them to raise new arguments only after their appeal of right has concluded.

If unsuccessful litigants can disclaim an issue during the course of litigation, yet resurrect it by simply tossing a paragraph into a rehearing petition, then neither the opposing party nor the appellate courts have the opportunity promised by the rules for the full and fair airing of issues before this Court's "review, not . . . first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Spending this Court's scarce resources to decide an issue that was not passed on because it was so barely "pressed" below condones gamesmanship.

Nor is it necessary to resolve the private action question in order to determine the scope of Section 14(e)'s prohibition on false statements. The two issues are analytically distinct. Whether or not Congress intended the prohibition to be privately enforceable (and it did), the prohibition's scope necessarily remains the same. And the meaning of Section 14(e)'s first clause cannot be held hostage to the separate private right question on the theory that the Ninth Circuit's culpability ruling somehow "extended" a long-established private right. A court does not "extend" anything when it re-states what is already express in the statute, even when that court, like the Ninth Circuit here, is the first to closely read the specific text at issue.

Contrary to Petitioners' arguments, Pet. Br. 43–45, there are not distinct analyses for private rights of action that remedy negligence and those that remedy fraud; there is only one question—did Congress intend to confer a remedy, the answer to which does not depend upon the substantive scope of the prohibition. And the inverse is true—one can determine whether Section 14(e) covers negligently untrue statements without regard to the manner of enforcement. *See* Resp. Br. 11. The proof is in the Court's prior decisions, which saw no reason to intermingle the two questions. The Court never questioned the existence of a private right in *Schreiber*, 472 U.S. 1, when determining the scope of "manipulative" for Section 14(e)'s second clause. And there is equally no reason to question its

existence here in deciding the negligence standard for the first clause.[6]

B. Based on this Court's Precedent, Congress Reasonably Would Have Expected Its Enactment of Section 14(e) to Confer a Private Remedy.

If this Court nonetheless reaches out to catch the question neglected below, it should conclude that shareholders of companies targeted by a tender offer do have a private right of action under Section 14(e). The text, structure, history and purpose of the Williams Act prove as much, especially when the "circumstances of its enactment," *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979), are duly considered.

1. When deciding whether to imply a private right in a federal statute, this Court's mission is to infer what Congress intended when it enacted the statute. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982). So the "initial focus must be on the state of the law at the time the legislation was enacted." *Id.*

When the Williams Act was passed, the default rule was that provisions benefiting particular classes

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[6] If the Court determines, however, that the culpability standard of Section 14(e)'s first clause is inextricably intertwined with the existence of a private right, it should dismiss the petition as improvidently granted given Petitioners' express concession that a private right of action exists under Section 14(e) and the resulting absence of any judicial ruling on this point to inform this Court's review.

of private actors would be enforceable by implied private actions absent express congressional foreclosure. *Id.* at 374–77. And the Court had made it clear—just four years earlier—that proxy fights under Section 14(a) were proper fodder for private litigation. Specifically, in *Borak* the Court held that Section 14(a)'s investor-protection purpose "implies the availability of judicial relief where necessary," and private enforcement "provides a necessary supplement to Commission action." 377 U.S. at 432. The proxy solicitation regime—complete with private right of action—was the very context that Congress was seeking to mirror with respect to tender offers in the Williams Act. Congress thus reasonably expected that its enactment of Section 14(e) conferred a similar private remedy in the tender-offer context when it used words in Section 14(e) that were virtually indistinguishable from those of Rule 14a-9, which *Borak* had just declared privately enforceable. *See* Resp. Br. 30 n.14.

Evolution in judicial (un)willingness to infer private rights cannot displace the enacting Congress's manifest intent. Where, as here, the statute is intended to parallel a preexisting implied right that this Court had already recognized, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it expected its enactment to be interpreted in conformity with them." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979).

2. To be sure, such historical "context shorn of text" is not dispositive. *Alexander v. Sandoval*, 532

U.S. 275, 288 (2001). But here the textual prohibition of specified conduct in a circumscribed realm, directed to protect a defined class, combined with the fact that the period of the 1960s and early 1970s was one in which "this Court had consistently found implied remedies," suffices to carry the day. *Cannon*, 441 U.S. at 698.

The broad language of Section 14(e) contains the affirmative textual support needed to create a private right of action. A comparison with *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), is illuminative. There, the Court held that Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a), did not create a private right because it "proscribes no conduct as unlawful," 442 U.S. at 576, and "[b]y its terms," was "forward-looking, not retrospective," seeking to promote good conduct and "forestall insolvency, not to provide recompense after it has occurred." *Id.* at 570–71. In contrast, Section 14(e)'s text—like that of Section 14(a) and Rule 14a-9, which provide the private right for the proxy context—plainly proscribes conduct as unlawful and looks backward in doing so (assessing violations after the fact) indicating an intention to compensate for injury.

Nor does Section 14(e)—or anything else in the Williams Act—evince any congressional intent to limit the rights-creating language to a specific equitable remedy. That happened in *Transamerica*, where the Court read two provisions *in pari materia* to limit the implied right under the Investment Advisers Act of 1940 to the "specific and limited relief" of equitable rescission of the contracts involved. 444 U.S. at 18. But Section 14(e), like the private right in Section 14(a)

confirmed in *Borak*, and in contrast to the provision construed in *Transamerica*, has no neighboring provisions that circumscribe its scope of relief.

3. Beyond Section 14(e)'s conduct-proscribing text that aims to protect a targeted class of actors, and the absence of any indicia that Congress intended to circumscribe a private remedy in the wider statutory structure, the Williams Act's legislative history shows that Congress was aware, and welcomed, judicial enforcement of a private right to protect the statute's full-disclosure promise. *Borak* and its implications for implied private rights were mentioned twice in written statements to Congress. *See* S. 510 Hearings, at 67 (written statement of Professor Carlos L. Israels) ("Presumably we may assume that the Commission will be able to enforce the provisions of this Bill, if it is enacted, and of its rules thereunder by proceedings for injunction in the Federal courts; and that under *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) a private litigant could seek similar relief before or after the significant fact such as the acceptance of his tender of securities."); *id.* at 140 (written statement of Professor William H. Painter) (discussing the Williams Act's use of the term "unlawful" and stating, "such language is being judicially construed to allow not only injunctive relief by the Commission and criminal penalties for willful violations but also private remedies to injured investors (*J. I. Case Co. v. Borak*, 377 U.S. 426 (1964))").

Congress's subsequent amendments to the Williams Act, moreover, reflected acquiescence in judicial interpretations of the Act as conferring a private right of action. When Congress amended the

Williams Act in 1970, it was aware that private lawsuits had already been brought under the Act— yet did not seek to foreclose them. *See infra* Part II.C. The Act's sponsor, Senator Williams, described how the Act had "worked well in lifting the veil of secrecy that had previously surrounded tender offers." S. 3431 Hearings, at 1.[7]

4. This Court has also recognized Congress's purpose to protect shareholders. In *Piper*, 430 U.S. at 31–33, the Court declined to extend the private right of action under Section 14(e) to tender *offerors*. But the Court did not cast doubt on the accepted notion that a private remedy was available for shareholders, the class Congress plainly intended to protect. After a thorough discussion of the legislative history and purpose of the Williams Act, the majority concluded that the Williams Act's "sole purpose . . . was the protection of investors." *Id.* at 35. The plaintiff-offeror there had no implied right of action for damages under 14(e), not because there was no such action, but because the plaintiff "did not sue in the capacity of an injured Piper shareholder, but as a defeated tender offeror." *Id.* at 39, 42. The dissent made explicit what was implicit within the majority's reasoning, "Section 14(e) was patterned after § 14(a), which regulates proxy contests. It is clear that a shareholder may recover in a suit under § 14(a) even though he was not

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[7] Congress amended the Williams Act a second time in 1977, and again did not tamp down on the implied private rights. *See Fla. Commercial Banks v. Culverhouse*, 772 F.2d 1513, 1517–18 (11th Cir. 1985).

himself deceived by the misrepresentations." *Id.* at 57--58 (footnotes omitted).

So, while *Piper* concluded that tender offerors lacked standing, it has been subsequently interpreted to stand for the general proposition that *shareholders and tender offer targets* do have an implied private right. If this settled precedent is to be disturbed, it is for Congress, not this Court to do so, especially given the thin ice on which this unnecessary question presented currently stands. *See* Resp. Br. 27–28.

C. The Existence of an Implied Private Right in Section 14(e) Is Entrenched and this Court Should Not Now Overturn It.

Even *Sandoval* itself, although declining to infer a private right from a regulation that surpassed the scope of the authorizing statute, confirmed the existence of a private right for Section 601 of Title VI of the Civil Rights Act of 1964. The Court accepted that private right as "given" because it had "already been construed as creating a private remedy," and courts and Congress had long acquiesced. 532 U.S. at 280 (discussing and quoting *Cannon*, 441 U.S. at 696). The same holds true here.

Where an implied private right of action has previously been recognized and become established precedent, the Court has been unwilling to lightly set it aside. *See Virginia Bankshares, Inc.*, 501 U.S. at 1114 (Kennedy, J., concurring in part and dissenting in part). Although this Court may refuse to expand the scope of implied private rights, it has proved loath to

scrap an implied private right once it has been judicially accepted. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 192–93 (2005).[8] This is especially true in the securities context where courts, Congress, and regulators have viewed private remedies as an essential component of the menu of enforcement options since the 1940s. *E.g.*, *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (recognizing implied action under Section 10(b) of the Securities Exchange Act of 1934).

The first Section 14(e) case, filed a few weeks after the Williams Act was signed into law, never even discussed whether Section 14(e) conferred a private right. This issue was simply assumed to be true—by everyone. The district court and appellate court decisions focused instead on the secondary issue of whether the plaintiffs—nontendering shareholders and the targeted company—had standing. *See Elec. Specialty Co. v. Int'l Controls Corp.*, 296 F. Supp. 462 (S.D.N.Y. 1968), *aff'd in part* 409 F.2d 937 (2d Cir. 1969).

The understanding that an implied private right of action exists under Section 14(e) quickly became

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[8] Giving the text of Section 14(e) its plain meaning to reach negligent material misstatements as well as fraud would not be, as Petitioners argue, "expanding" the long-recognized private right of action under Section 14(e). *See* Pet. Br. 22–42. To the contrary, to engraft a scienter standard throughout Section 14(e) would curtail an existing private right of action, limiting the statute to its second clause. In all events there is no reason to throw the baby out with the bath water and eliminate the private right of action that has long existed for scienter-based frauds and deception under the second clause of Section 14(e).

entrenched in the Second Circuit, *see Butler Aviation Int'l v. Comprehensive Designers, Inc.*, 425 F.2d 842 (2d Cir. 1970), and accepted in other circuits as well. *See Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir. 1970); *Susquehanna Corp. v. Pan Am. Sulphur Co.*, 423 F.2d 1075 (5th Cir. 1970). In *none* of these early Section 14(e) cases was the existence of a private right of action ever questioned.

This understanding of Section 14(e) was widely shared by law professors and practitioners. Review of legal scholarship in the late 1960s and early 1970s indicates unanimous recognition of the right. For example, Professor Loss's securities law treatise, updated in 1969, devoted a dozen pages to the Williams Act. The treatise discussed potential remedies for private litigants under the Williams Act but never evinced any doubt that implied private rights existed thereunder. *See generally* VI LOUIS LOSS, SECURITIES REGULATION 3658–69 (2d ed. Supp. 1969).

Law journal articles also did not question the point. When the Williams Act was pending in Congress, several articles were published about it. None expressed doubt that the Williams Act would create private rights of action, including in Section 14(e). *E.g.*, Victor Brudney, *A Note on Chilling Tender Solicitations*, 21 RUTGERS L. REV. 609, 624 (1967) (stating the Williams Act "will create a happy hunting ground for plaintiffs"); Joseph D. Reid, *Senate Bill 510 and the Cash Tender Offer*, 14 WAYNE L. REV. 568, 587 (1968) (stating acquirers will "hold themselves open to the possibility of litigation from disapproving minority shareholders, sellers of shares during the takeover

and the SEC"). In 1969, a law review article noted that, "[a]s most observers predicted, the federal courts have now accepted jurisdiction under Section 14(e) of suits by offeree companies," and suits brought by offerors and shareholders were likely. W. McNeil Kennedy, *Defensive Take-Over Procedures Since the Williams Act*, 19 CATH. U. L. REV. 158, 162 (1969).[9]

The courts and Congress's acquiescence in the private right has extended well beyond the years immediately after its passage. Although sometimes sloppy with respect to parsing the differing culpability standards, courts of appeals have continued to unquestioningly allow private enforcement. *See, e.g.*, *Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 352 (2d Cir. 1990) (upholding a private right of action on behalf of tender offer shareholders under Section 14(e)); *Plaine v. McCabe*, 797 F.2d 713, 717–18 (9th Cir. 1986) (same); *Fla. Commercial Banks*, 772 F.2d at 1516–19 (upholding a private right of action for an issuer under Section 14(e)); *Gearhart Indus., Inc. v. Smith Int'l Inc.*, 741 F.2d 707, 714–16 (5th Cir. 1984) (same).

And while this Court has never explicitly pronounced that Section 14(e) confers a private right, it has done everything but. *Piper* denied the private right only to tender offerors, and both the majority and

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[9] It was not until the late 1970s that some scholarship began to question the existence of implied private rights under the Williams Act. *See, e.g.*, Harvey L. Pitt, *Standing to Sue Under the Williams Act After* Chris-Craft*: A Leaky Ship on Troubled Waters*, 34 BUS. LAW. 117 (1978). And that scholarship failed to gain any traction in the appellate courts.

dissent recognized that shareholders were indisputably the protected class under Section 14(e), presuming their right to private enforcement. *See* 430 U.S. at 39, 42, 57–58. *Schreiber* similarly took as given the existence of the private right when defining its elements. 472 U.S. at 2. *Rondeau*, 422 U.S. at 60 & n.10, acknowledged the existence of "an adequate remedy by way of an action for damages," when ruling on the Williams Act's requirements for injunctive relief. And *O'Hagan*, 521 U.S. at 667, 671, twice-referred to Section 14(e) as a "self-operating" provision. Such a long-settled understanding of courts, litigants, and Congress should not be disrupted, especially given the historical embrace of private rights in the securities law context.[10]

D. Allowing a Negligence-Based Private Right Under Section 14(e) Furthers the Statute's Purpose and Is Sound Public Policy.

In enacting the Exchange Act and its follow-on statutes, "Congress sought to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 544 (2019) (Ginsburg, J., concurring) (quoting *SEC v. Zandford*, 535 U.S. 813, 819 (2002)). That is why the statute "should be construed not technically and

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[10] As Respondents explain, Congress has made no attempt to change this status quo, despite repeated opportunities to do so when amending the securities laws; if anything Congress has endorsed the existence of a private right under Section 14(e). *See* Resp. Br. 41–43.

restrictively, but flexibly to effectuate its remedial purposes." *Id.*

To achieve these remedial purposes, the Court has long recognized the importance of private securities litigation as a supplement to government regulation. *E.g.*, *Tellabs, Inc.*, 551 U.S. at 320 n.4 (2007) ("Nothing in the PSLRA . . . casts doubt on the conclusion 'that private securities litigation is an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006))); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 376 (1991) (private lawsuits are "an essential tool for enforcement of the 1934 Act's requirements" and "a necessary supplement to Commission action" (first quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988); then quoting *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985))).

NASAA's state regulators agree. Private securities actions help maintain robust capital markets by deterring fraud and other corporate malfeasance and by convincing investors that if they are harmed by incomplete or untrue disclosures, they have fair opportunities to recover their losses. Federal regulators, too, are on record as supporting private actions. *See* SG Br. 30–31 (agreeing that private rights recognized by the Court are an "important adjunct to government enforcement").

In a 2018 speech, SEC Commissioner Robert J. Jackson acknowledged that "world-class [SEC]

enforcement attorneys cannot do it all alone, [and] [t]hat's why the Supreme Court has said for years that policing corporate wrongdoing is a team effort." Robert J. Jackson Jr., Comm'r, SEC, Address at CECP CEO Investor Forum: *Keeping Shareholders on the Beat: A Call for a Considered Conversation About Mandatory Arbitration* (Feb. 26, 2018).[11]

The SEC's Investor Advocate likewise recently described the "very good reasons why shareholders have been given private causes of action." Rick Fleming, Investor Advocate, SEC, Address at PLI's The SEC Speaks in 2018: *Mandatory Arbitration: An Illusory Remedy for Public Company Shareholders* (Feb. 24, 2018).[12] He explained the government's "traditionally . . . limited role in policing our markets, as evidenced by the fact that only 4,600 SEC employees oversee approximately $72 trillion in securities trading each year, as well as the disclosures of more than 8,100 public companies and the activities of more than 26,000 registered entities." *Id.* And he recounted his experiences as a state regulator, where he "frequently cautioned investors that they should retain private counsel, because even though the interests of victims were generally aligned with the interests of [state securities regulators], those interests could diverge." *Id.* Thus, "it might be in the best interest of the state to take away a license," but that could "decrease the likelihood that a victim would

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[11] *Available at* https://www.sec.gov/news/speech/jackson-shareholders-conversation-about-mandatory-arbitration-022618.

[12] *Available at* https://www.sec.gov/news/speech/fleming-sec-speaks-mandatory-arbitration.

be repaid." *Id.* "[I]nvestors [also] have remedies that may not be available to regulators, the most important of which is the ability to seek full restitution of their losses instead of merely disgorging the bad actor's ill-gotten gains." *Id.* NASAA could not agree more: private actions are necessary complements to, not substitutes for, state and federal enforcement. And these observations by federal enforcers belie the Solicitor General's suggestion that state or federal enforcement actions and private state claims alone are an adequate substitute for federal private actions. SG Br. 32 n.4.

Even Congress, in legislation designed to curtail the scope of private securities litigation through the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 757, and the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, retained the core principle that private rights of action should remain: "The SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws." S. REP. No. 104-98, at 8 (1995).

Finally, private securities litigation such as the implied right that has long existed under Section 14(e) serves a significant role in maintaining investor confidence by enforcing disclosure standards set forth in the securities laws. As this Court has recognized, the "magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Dabit*, 547 U.S. at 78. Nor is it a problem that implied

private actions may overlap with express private actions or government enforcement. As this Court has recognized, a belts-and-suspenders approach to securities enforcement is welcome: given the broad goals of the securities laws to achieve honest and efficient markets based on fair and full access to information, the "fact that there may well be some overlap is neither unusual nor unfortunate." *Naftalin*, 441 U.S. at 778 (quoting *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 468 (1969)).

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's decision or dismiss the petition as improvidently granted.

Respectfully submitted.

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No. 18-459

IN THE

Supreme Court of the United States

EMULEX CORPORATION, ET AL.,
Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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No. CIV. A. 88-8633, 1993 WL 130381
(E.D. Pa. Apr. 22, 1993),
aff'd, 16 F.3d 403 (3d Cir. 1993) 4, 21

In re Hatteras Fin., Inc., S'holder Litig.,
286 F. Supp. 3d 727 (M.D.N.C. 2017) 17

Janus Capital Grp., Inc. v. First Derivative Traders,
564 U.S. 135 (2011) 27

Lorillard v. Pons,
434 U.S. 575 (1978) 10

Matrixx Initiatives, Inc. v. Siracusano,
563 U.S. 27 (2011) 2

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,
456 U.S. 353 (1982) 10

Mills v. Electric Auto-Lite Co.,
296 U.S. 375 (1970) 25

Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,
575 U.S. ___, 135 S. Ct. 1318 (2015) 1

Prudent Real Estate Tr. v. Johncamp Realty, Inc.,
599 F.2d 1140 (2d Cir. 1979) 20

Rosenfeld v. Time Inc.,
No. 17CV9886 (DLC),
2018 WL 4177938 (S.D.N.Y. Aug. 30, 2018) 17

SEC v. Ginsburg,
362 F.3d 1292 (11th Cir. 2004) 6, 7, 8

Schreiber v. Burlington N., Inc.,
472 U.S. 1 (1985) 8, 20

Seaboard World Airlines, Inc. v. Tiger Int'l, Inc.,
600 F.2d 355 (2d Cir. 1979) 20

Smallwood v. Pearl Brewing Co.,
489 F.2d 579 (5th Cir. 1974) 7, 10

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 28

TSC Indus., Inc., v. Northway, Inc.,
426 U.S. 438 (1976) 20, 21, 25

United States v. Morton,
467 U.S. 822 (1984) 9

In re Walgreen Co. Stockholder Litig.,
832 F.3d 718 (7th Cir. 2016) 13, 17

State Cases

In re 3Com S'holders Litig.,
Civil Action No. 5067-CC,
2009 WL 5173804 (Del. Ch. Dec. 18, 2009) 26

Acevedo v. Aeroflex Holding Corp.,
No. 7930-VCL,
2015 WL 4127547 (Del Ch. July 8, 2015) 15

Arnold v. Soc'y for Sav. Bancorp, Inc.,
650 A.2d 1270 (Del. 1994) 22

In re Aruba Networks, Inc. Stockholders Litig.,
No. 10765-VCL (Del. Ch. Oct. 9, 2015)
(Transcript) 14, 15

Assad v. World Energy Sols., Inc.,
No. 10324-CB (Del. Ch. Aug. 20, 2015)
(Transcript) 14, 15

Dent v. Ramtron Int'l Corp.,
C.A. No. 7950-VCP, 2014 WL 2931180 (Del. Ch.
June 30, 2014) 26

Lee v. Pincus,
C.A. No. 8458-CB, 2014 WL 6066108 (Del. Ch.
Nov. 14, 2014) 27

Malpiede v. Townson,
780 A.2d 1075 (2001) 26

In re Micromet Inc. S'holders Litig.,
C.A. No. 7197-VCP, 2012 WL 681785 (Del. Ch. Feb. 29, 2012) 22

In re Riverbed Tech., Inc. Stockholders Litig.,
No. 10484-VCG (Del Ch. July 27, 2015) (Transcript) 15

In re Trulia, Inc. Stockholder Litig.,
129 A.3d 884 (Del. Ch. 2016) 4, 15, 16

In re Zale Corp. Stockholders Litig.,
C.A. No. 9388-VCP, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015) 26

Federal Statutes

15 U.S.C. § 78n(e) 8, 9

Securities Litigation Uniform Standards Act, Pub L. No. 105-353, 112 Stat. 3227 (1998) 10

Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) 10

The Williams Act, Pub. L. No. 90-439, 82 Stat. 455 20

Legislative Materials

S. Rep. No. 105-182 (1998) 11

S. Rep. No. 104-98 (1995) 10

S. Rep. No. 90-550 (1967) 22, 23

Rules

17 C.F.R. § 240.14d-1(c) (2019) 24

17 C.F.R. § 240.14d-10 23

17 C.F.R. § 240.14e-8(c) (2019) 24

Secondary Sources

Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 Iowa L. Rev. 465 (2015) 13

Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 Vand. L. Rev. 603 (2018) 11, 13

Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015*, Berkeley Cent. for L. Bus. Econ. (Jan. 14, 2016), https://ssrn.com/abstract=2715890 17

Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and A Proposal for Reform*, 93 Tex. L. Rev. 557 (2015) 12, 13

Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 Berkeley Bus. L.J. 55 (2014) 12, 14

Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 Ala. L. Rev. 473 (2007) 21

David Offenberg & Christo Pirinsky, *How Do Acquirers Choose between Mergers & Tender Offers?*, 116 J. Fin. Econ. 331 (2015) 24

Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 Wash. U. L.Q. 417 (2003) 19

Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions*, 57 Vand. L. Rev. 1797 (2004) 12

Annual Report Statistics, Del. Division of Corps., https://corp.delaware.gov/stats/ 9

Cornerstone Research, *Securities Class Action Filings: 2018 Year in Review* (Jan. 30, 2019), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2018-Year-in-Review 18

Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation* (2018), https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-of-Public-Companies-Review-of-2017-M-and-A-Litigation 13, 14, 16, 17

NERA, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* (Jan. 23, 2017), https://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf 17

NERA, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* (Jan. 29, 2019), https://www.nera.com/content/dam/nera/publications/2019/PUB_Year_End_Trends_012819_Final.pdf 16, 17, 18

Treatise

Thomas L. Hazen, *Treatise on the Law of Securities Regulation* § 1:16 (7th ed. 2017) 20

INTEREST OF AMICUS CURIAE[1]

The Securities Industry and Financial Markets Association ("SIFMA") is the leading securities industry trade association, representing the interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA works to represent its members' interests locally and globally – it has offices in New York and Washington, D.C. and is the U.S. regional member of the Global Financial Markets Association.

On behalf of the industry's nearly one million employees, SIFMA advocates on issues affecting retail and institutional investors, equity and fixed income markets, and related products and services. To further that mission, SIFMA regularly files *amicus* briefs in cases that raise issues of concern to securities industry participants. *See, e.g.*, *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 583 U.S. ___, 138 S. Ct. 1061 (2018); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. ___, 135 S. Ct. 1318 (2015); *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013); *Gabelli v. SEC*, 570 U.S. 254 (2011); *Erica P. John Fund, Inc.*

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[1] All parties consented to the filing of this brief. This brief was not authored in whole or in part by counsel for any party, and no person or entity other than SIFMA, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

v. Halliburton Co., 563 U.S. 804 (2011); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011).

The issues raised by this appeal are of vital importance to SIFMA and its members. The plaintiffs-side securities class action bar files lawsuits challenging the vast majority of U.S. public company merger transactions. These "merger objection" suits frequently focus on the financial advice provided to the seller's board of directors – stockholders routinely allege that the financial advisors' analyses were flawed and accompanied by inadequate or incomplete disclosures. The financial analyses targeted in these "merger objection" class actions typically are provided by SIFMA members.

Until recently, stockholders filed most "merger objection" class actions in state court under theories based on state law. Since early 2016, however, and for reasons discussed more fully below, stockholders have changed strategies and now are filing "merger objection" cases in federal court invoking § 14 of the Securities Exchange Act of 1934 (the "Exchange Act"). The appeal here concerns § 14(e), the subsection of the statute governing mergers completed by tender offer. The Ninth Circuit's decision erroneously adopting a negligence standard for § 14(e) claims will, if upheld, have an enormous impact on the mergers and acquisitions industry and especially on financial advisors.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit incorrectly held that a stockholder asserting a claim under § 14(e) of the Exchange Act is required to plead and prove facts showing that the defendant, in making a false statement or misleading omission in connection with

a tender offer, was merely negligent. This Court should reverse the Ninth Circuit and hold that § 14(e) claims require a showing of scienter – the intent to deceive investors – for several reasons.

First, to reach its conclusion that mere negligence is sufficient to state a claim for money damages under § 14(e), the Ninth Circuit improperly focused on a single clause in the opening sentence of the statute, while ignoring the overall context and structure of § 14(e). As every other court that has addressed the issue over forty years has found, § 14(e) – when the plain text is read in context and as a whole – is an anti-fraud statute that was modeled on Rule 10b-5. In addition to the text of the statute, this conclusion is supported by the congressional record since the adoption of § 14(e), which shows Congress repeatedly chose not to amend § 14(e) to impose a negligence standard after multiple courts interpreted the statute to require scienter.

Second, the Ninth Circuit's negligence standard will encourage and federalize frivolous "merger objection" litigation. The elements of a § 14(e) claim have become critically important given recent developments in the "merger objection" litigation industry. "Merger objection" suits have been around for many decades, but beginning in or around 2000, plaintiffs-side securities class action firms began filing an increasing number of lawsuits challenging the vast majority of public company merger transactions. By 2015, more than 90% of all public company deals were targeted with "merger objection" litigation. The vast majority of these cases were filed in state court, most frequently in Delaware.

In early 2016, however, the Delaware Chancery Court issued the landmark decision *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 885 (Del. Ch. 2016), which discouraged stockholders from bringing "merger objection" litigation in state court by limiting "disclosure only" settlements (discussed below). To avoid the impact of the *Trulia* decision, stockholders began filing their "merger objection" suits in federal court, relying on § 14 of the Exchange Act. As a result, the number of "merger objection" cases in federal courts has more than doubled since 2016. "Merger objection" litigation has become a federal court and federal law problem that likely will be exacerbated if stockholders can state viable causes of action based on allegations of mere negligence.

Third, other important policy considerations strongly support requiring a scienter standard for claims under § 14(e). For example, the Ninth Circuit's negligence standard creates a substantial risk of over-disclosure. If merger participants can be held personally liable for money damages in multi-billion dollar merger transactions solely on the basis of negligent omissions, merger parties are likely to err on the side of extreme caution and include in already voluminous tender offer documents every potential fact that a stockholder, with the benefit of hindsight, could claim was significant in some way. A negligence standard encourages parties to "bury shareholders in an avalanche of trivial information."[2]

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[2] *In re Goodyear Tire & Rubber Co. Sec. Litig.*, No. CIV. A. 88-8633, 1993 WL 130381, at *6 (E.D. Pa. Apr. 22, 1993), *aff'd*, 16 F.3d 403 (3d Cir. 1993).

Similarly, a negligence standard creates a potential chilling effect on tender offers that are beneficial to the financial markets in general and stockholders in particular. The potential for massive liability arising from an inadvertent omission may cause bidders to refrain from conducting tender offers to replace an entrenched but inefficient management team. A decline in tender offers hurts the market generally and shareholders in particular.

Finally, the Ninth Circuit's adoption of a negligence standard undercuts settled rules in the law of mergers and acquisitions. For example, Delaware law has long held that merger parties must provide stockholders with a "fair summary" of any fairness opinion provided by a financial advisor, while at the same time rejecting claims that seek disclosure of the minutiae and underlying details and assumptions relating to a financial advisor's analysis. The Ninth Circuit's negligence standard creates a strong incentive to disclose every conceivable fact relating to a fairness opinion and not merely a "fair summary."

ARGUMENT

U.S. public companies implement M&A transactions through a variety of legal mechanisms. The mechanism chosen for any particular merger transaction depends on an array of factors, including tax, regulatory, and financial issues. One common structure is the tender offer. In a tender offer, the buyer goes directly to the target's stockholders and offers to purchase their shares, typically at a premium to the prevailing market price. Tender offers may be used in connection with both hostile and friendly mergers. Stockholder disclosures in the tender offer context are governed by state law as well

as federal law, in particular § 14(e) of the Exchange Act and the SEC's rules promulgated thereunder.[3]

Merger transactions are obviously significant events in the life of public companies, posing economic risks for boards of directors, management, employees, stockholders and creditors. Capitalizing on these risks, the plaintiffs-side securities class action bar has developed a litigation strategy designed to extract quick settlements from merger participants by threatening the parties' ability to timely close on agreed transactions, even where the underlying claims lack merit. As explained below, this Court should hold that claims under § 14(e) require scienter because the Ninth Circuit's negligence standard is not supported by the text of § 14(e), case law, congressional intent, or public policy.

I. THE NINTH CIRCUIT ERRED BY ADOPTING A NEGLIGENCE STANDARD FOR SHAREHOLDER CLAIMS UNDER § 14(e) OF THE EXCHANGE ACT.

A. The Ninth Circuit's Negligence Standard Is Inconsistent with the Plain Text of the Statute.

In adopting a negligence standard for § 14(e), the Ninth Circuit expressly acknowledged that it was rejecting past decisions by the Second, Third, Fifth,

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[3] This Court has never held that there is an implied private right of action under § 14(e). The Ninth Circuit assumed that such a private right of action exists without analyzing the issue under *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). *See* Pet. App. 19a. The Court may reverse the Ninth Circuit for the separate and independent reason that that there is no implied private right of action under § 14(e).

Sixth, and Eleventh Circuits, all of which require scienter as an element of a § 14(e) claim.[4]

The circuits adopting a scienter standard have correctly emphasized the similarities between § 10(b) (15 U.S.C. § 78j), which requires scienter, and § 14(e).[5] In *Chris-Craft Industries*, for example, the Second Circuit stated that although § 14(e) applied to tender offers while § 10(b) applied to the purchase or sale of securities, "the underlying proscription of § 14(e) is virtually identical to . . . Rule 10b-5." 470 F.2d at 362. The following year, the Fifth Circuit also concluded that the elements of a § 14(e) violation and a § 10(b) violation "are identical." *Smallwood*, 489 F.2d at 606.

The Sixth Circuit next adopted a scienter standard for § 14(e). *Adams*, 623 F.2d at 431. There, analyzing the plain language of § 14(e), the Sixth Circuit held that the "language of the Williams Act clearly demonstrations that Congress envisioned scienter" to be required to prove a § 14(e) violation. *Id.*

Over 20 years later, the Third Circuit joined the Second, Fifth, and Sixth, again comparing § 14(e) to § 10(b) and concluding that the two should be

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[4] *See SEC v. Ginsburg*, 362 F.3d 1292, 1297-98 (11th Cir. 2004); *In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 428-29, 431 (6th Cir.), *cert. denied*, 449 U.S. 1067 (1980); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 596, 605 (5th Cir. 1974); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 362 (2d Cir.), cert. denied, 414 U.S. 910 (1973).

[5] *See Ginsburg*, 362 F.3d at 1298; *In re Digital Island Sec. Litig.*, 357 F.3d at 328; *Adams*, 623 F.2d at 432; *Smallwood*, 489 F.2d at 596; *Chris-Craft Indus., Inc.*, 480 F.2d at 363-64.

"construed . . . consistently." *In re Digital Island Sec. Litig.*, 357 F.3d at 328. That same year, the Eleventh Circuit adopted a scienter standard. *Ginsburg*, 362 at 1297 ("In order to establish liability under § 10(b) and § 14(e) . . ., the SEC must prove that Ginsburg acted with scienter. . . . ."). And this Court likewise has recognized the similarity between § 10(b) and § 14(e), noting that both are anti-fraud statutes designed to prevent knowing violations of the securities laws. *See Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10-11 (1985).

The Ninth Circuit rejected the rationale of these courts, instead engaging in a textual analysis of § 14(e) – after assuming the existence of a private right of action – to conclude that negligence is the proper standard. But the Ninth Circuit's analysis is flawed.

In the opinion below, the Ninth Circuit divided § 14(e) into two completely separate parts:

> "It shall be unlawful for any person [1] to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statement made, in the light of circumstances under which they are made, not misleading, *or* [2] to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . ."

Pet. App. 8a (quoting 15 U.S.C. § 78n(e)) (emphasis and alterations in original). Construing the statute as creating "two different offenses," the Ninth Circuit concluded that "because the text of the first clause of Section 14(e) is devoid of any suggestion that scienter is required, we conclude that the first clause

of Section 14(e) requires a showing of only negligence, not scienter." Pet. App. 8a, 16a.

This analysis, however, violated the principle that courts should not "construe statutory phrases in isolation." *United States v. Morton*, 467 U.S. 822, 828 (1984). Despite the Ninth Circuit's decision to parse § 14(e) into two parts, § 14(e) is a single sentence that includes the language of an anti-fraud provision, including the words "misleading," "fraudulent," "deceptive," and "manipulative." 15 U.S.C. § 78n(e). The Ninth Circuit artificially drew a line between this language and the first portion of § 14(e) without any basis for such a division, and therefore its analysis is wrong.[6]

The Ninth Circuit also ignored Congress's grant of authority to the SEC in the final sentence of § 14(e):

> The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

15 U.S.C. 78n(e). This regulatory authority provision confirms that Congress intended § 14(e) to serve as an anti-fraud rule.

This Court should reject the Ninth Circuit's negligence standard and instead adopt a scienter

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[6] Moreover, even if the Ninth Circuit were correct in dividing § 14(e) into two clauses, the first clause in no way suggests that *negligence* is required; it says nothing about the mental state necessary to support a claim for making a material false statement.

standard for violations of § 14(e) based on the rationale articulated by the Second, Third, Fifth, Sixth, and Eleventh Circuits.

B. Congressional Intent Confirms That § 14(e) Claims Require Scienter.

The Ninth Circuit also ignored the significance of Congress's decision to leave § 14(e) untouched when enacting the Private Securities Litigation Reform Act of 1995 (the "PSLRA") and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). SLUSA, Pub. L. No. 105-353, 112 Stat. 3227 (1998); PSLRA, Pub. L. No. 104-67, 109 Stat. 737 (1995). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 409 n.66 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

The Second, Fifth, and Sixth Circuits adopted a scienter standard for § 14(e) prior to the passage of both the PSLRA and SLUSA. In fact, the last of those three decisions was adopted in 1980, fifteen years before the PSLRA was adopted. *See Adams*, 623 F.2d at 428; *Smallwood*, 489 F.2d at 605; *Chris-Craft Indus.*, 480 F.2d at 362. Congress, however, did not revise § 14(e) in connection with either the PSLRA or SLUSA, both of which presented an opportunity to do so. *See, e.g.*, S. Rep. No. 104-98, at 4 (1995) (noting that the purpose of the PSLRA was "to encourage the voluntary disclosure of information by corporate issuers; . . . to empower investors so that they—not their lawyers—exercise primary control over private securities litigation; and . . . to encourage plaintiffs' lawyers to pursue valid claims and defendants to fight abusive claims.").

When passing SLUSA, the Senate Committee on Banking, Housing, and Urban Affairs:

> emphasize[d] that the clear intent in 1995 and our continuing intent in this legislation is that neither the PSLRA nor S. 1260 [the precursor bill to SLUSA] in any way alters the scienter standard in federal securities fraud suits. It was the intent of Congress, as was expressly stated during the legislative debate on the PSLRA, and particularly during the debate on overriding the President's veto, that the PSLRA establish a uniform federal standard on pleading requirements by adopting the pleading standard applied by the Second Circuit Court of Appeals. . . . The Committee emphasizes that neither the PSLRA nor S. 1260 makes any attempt to define that state of mind.

S. Rep. 105-182, at 6 (1998).

Congress's decision to leave § 14(e) untouched – despite the unanimous view at the time that scienter was required to prove a violation of § 14(e) – indicates that Congress viewed scienter as the appropriate standard for state of mind.

II. A NEGLIGENCE STANDARD WILL FURTHER ENCOURAGE AND FEDERALIZE MERGER OBJECTION LITIGATION.

Beginning in or around the early 2000s, "merger objection" litigation started to become a cottage industry, with stockholders challenging an increasing percentage of public company mergers through shareholder class action litigation. *See, e.g.*, Matthew D. Cain et al., *The Shifting Tides of Merger*

Litigation, 71 Vand. L. Rev. 603, 610-11 (2018). The complaints in these "merger objection" cases often are nearly verbatim versions of prior complaints with only the parties' names changed, and they typically are filed within days of the announcement of the mergers. *See* Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions*, 57 Vand. L. Rev. 1797, 1827-28 (2004).

In these "merger objection" cases, the stockholder plaintiff generally alleges that the seller's board of directors sold the company for a price that was too low and through a sales process that was unfair in some way. *See* Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 Berkeley Bus. L.J. 55, 56-57, 68 (2014). Once the seller files the required public disclosures (*e.g.*, a proxy statement or tender offer recommendation), the stockholder plaintiff alleges that the disclosures are false and misleading with respect to the background or terms of the transaction. *See* Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and A Proposal for Reform*, 93 Tex. L. Rev. 557, 565 (2015).

In a typical case, the stockholder plaintiff immediately files a motion for a temporary restraining order and a preliminary injunction, arguing that the court should enjoin the closing of the transaction until the disclosure document is corrected or supplemented. After creating the risk that a transformative bet-the-company transaction might be enjoined, the stockholder plaintiff takes advantage of that risk by making an offer to settle with the merger parties. The standard proposal is

for a "disclosure-only" settlement: if the defendants make certain supplemental disclosures and pay plaintiffs' counsel a substantial fee award, plaintiffs will provide defendants with a broad release covering alleged misconduct in connection with the challenged transaction. The stockholder class receives only the supplemental disclosures. As the Seventh Circuit has observed, such a "class action that yields fees for class counsel and nothing for the class" is "no better than a racket." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016).

Such offers are nevertheless difficult for the merger parties to refuse. Faced with the uncertainty, expense, and distraction of litigation, and the risk (however small) that a court might enjoin a critical corporate transaction on the basis of an expedited litigation record, many defendants choose to settle even meritless "merger objection" cases. *See* Fisch et al., *supra*, at 565-66; Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 Iowa L. Rev. 465, 478 (2015) ("Settlements which only require disclosure constitute 55.1% of the settlement types in the sample and are the most common type of settlement.").

The attorneys' fees associated with these "disclosure only" settlements have reached into the millions of dollars. *See* Cain et al., *supra*, at 624. Able to obtain large fees for little work, the plaintiffs' bar has made the filing of "merger objection" lawsuits increasingly routine. In 2008, approximately 54% of all public M&A deals were challenged. *See* Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation* (2018)

at 2, https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-of-Public-Companies-Review-of-2017-M-and-A-Litigation (hereinafter "2017 Cornerstone Review"). This number rose sharply to 86% in 2009, and continued to rise until its peak of 94% in 2013. *See id.* The percentage of deals subject to suit hovered between 85% and 90% through 2015. *See id.*

These "merger objection" lawsuits are so common that they are viewed as a "merger tax" and part of the cost of doing M&A transactions. *See* Jeffries, *supra*, at 108 ("Through this overabundance of litigation, plaintiffs' attorneys have successfully attached what amounts to a transaction tax to an overwhelming majority of large public company deals. Attorneys extort this tax – in the form of attorneys' fees – from defendant companies who fear their deals will die after being tied up in lengthy, often frivolous litigation.").

A. *Trulia* Eliminates Delaware as a Friendly Forum for Merger Objection Suits.

Prior to 2016, the majority of these abusive "merger objection" suits were filed in Delaware pursuant to the "internal affairs doctrine." Over time, Delaware courts expressed increasing skepticism of "merger objection" cases generally and "disclosure-only" settlements in particular. *See Assad v. World Energy Sols., Inc.*, No. 10324-CB (Del. Ch. Aug. 20, 2015) ("It just can't be that there are meaningful disclosure violations in every single M&A case that's being filed in this court."); *see also In re Aruba Networks, Inc. Stockholders Litig.*, No. 10765-VCL (Del. Ch. Oct. 9, 2015) ("[W]e have

reached a point where we have . . . a real systemic problem."); *In re Riverbed Tech., Inc. Stockholders Litig.*, No. 10484-VCG (Del Ch. July 27, 2015) ("[A]t least some members of this Court have been thinking in some depth about what the value of disclosure-only settlements is.").

The primary reason for the Delaware courts' skepticism was that the supplemental disclosures in many cases addressed immaterial details that did not aid stockholders in deciding whether to approve a transaction. *See In re Aruba Networks*, No. 10765-VCL; *Assad*, No. 10324-CB; *In re Riverbed Tech.*, No. 10484-VCG; *Acevedo v. Aeroflex Holding Corp.*, No. 7930-VCL. (Del. Ch. July 8, 2015).

In *Trulia*, the Delaware Chancery Court largely eliminated "disclosure-only" settlements in order to reduce frivolous "merger objection" litigation. The *Trulia* court emphasized that:

> [s]cholars have criticized disclosure settlements, arguing that non-material supplemental disclosures provide no benefit to stockholders and amount to little more than deal "rents" or "taxes," while the liability releases that accompany settlements threaten the loss of potentially valuable claims related to the transaction in question or other matters falling within the literal scope of overly broad releases.

129 A.3d at 887.

Accordingly, the Chancery Court rejected the parties' "disclosure-only" settlement, finding that the supplemental disclosures that plaintiffs' attorneys obtained for the class were not "material or even helpful." *Id.* The Chancery Court made clear that

going forward, it would approve disclosure-only settlements only where "the supplemental disclosures address a plainly material misrepresentation or omission."

B. The Plaintiffs' Bar Shifts Merger Objection Suits to Federal Court.

The *Trulia* decision had an immediate impact on the plaintiffs' bar's tactics in "merger objection" litigation.[7] Since *Trulia*, the plaintiffs' bar has redirected "merger objection" litigation to federal courts. The post-*Trulia* transfer of "merger objection" litigation to federal courts has been immediate and substantial. In 2014, the federal courts saw 40 "merger objection" filings. *See* NERA, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* (Jan. 29, 2019) at 5, https://www.nera.com/content/dam/nera/publications/2019/PUB_Year_End_Trends_012819_Final.pdf (hereinafter "2018 NERA Review"). In 2015, that number rose to 42 "merger objection" filings. *Id.* In 2016, the federal courts saw more "merger objection" filings than the past two years combined, with 92 "merger objection" suits filed. *See id.* That number more than doubled in 2017, reaching 204 federal court "merger objection" suits. *See id.* That high level was sustained in 2018, with 210 "merger objection" suits filed. *See id.* The number of "merger objection" filings in federal courts in 2017 and 2018 is more than the number of filings in the years 2009 through 2015 combined. *See id.*

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[7] The number of challenged mergers dropped from 84% in 2015 to 71% in 2016 and 73% in 2017. *See* 2017 Cornerstone Review, *supra*, at 2.

This increase in federal filings corresponds to a decrease in "merger objection" lawsuits filed in Delaware. Pre-*Trulia*, when suing a company incorporated in Delaware, stockholders filed 60% of suits in Delaware. *See* NERA, "Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review" (Jan. 23, 2017) (citing Matthew D. Cain and Steven Davidoff Solomon, *Takeover Litigation in 2015*, Berkeley Cent. for L. Bus. Econ. (Jan. 14, 2016), https://ssrn.com/abstract=2715890). That number dropped to 23% in 2016 and to just 6% in 2017. *See* 2017 Cornerstone Review, *supra*, at 5.

Experts project that this trend will continue. 210 of the 441 securities class action filings in 2018 were "merger objection" cases in federal court. *See* 2018 NERA Review, *supra*, at 5.

The plaintiffs' bar has turned to federal courts in the hope that those courts would be willing to approve the type of disclosure-only settlements rejected in *Trulia*. *See Rosenfeld v. Time Inc.*, No. 17CV9886 (DLC), 2018 WL 4177938, at *2 (S.D.N.Y. Aug. 30, 2018) ("Post-*Trulia*, plaintiffs have begun bringing M&A lawsuits in other courts, particularly federal courts."). Plaintiffs have had mixed results, with some courts following *Trulia* and others willing to approve disclosure-only settlements. *Compare In re Walgreen Co. Stockholder Litig.*, 832 F.3d at 724-26 (adopting the rationale of *Trulia*), *with In re Hatteras Fin., Inc., S'holder Litig.*, 286 F. Supp. 3d 727, 730-31 (M.D.N.C. 2017) (approving settlement despite finding that supplemental disclosures were immaterial).

C. The Plaintiffs' Bar Forum Shops Within the Federal Court System.

Decisions by federal courts have had immediate impacts on "merger objection" litigation. For instance, the number of "merger objection" suits filed in the Seventh Circuit dropped by 60% within a year following its disapproval of disclosure-only settlements in *In re Walgreen Co. Stockholder Litigation*. 2018 NERA Review, *supra*, at 5.

Even prior to the Ninth Circuit's decision below, plaintiffs were flocking to the Ninth Circuit in disproportionate numbers. Although 50% of all U.S. corporations and over 67% of all Fortune 500 companies are incorporated in Delaware,[8] in 2017, only 20% of all federal-court challenges to M&A deals were filed in the Third Circuit; in 2018, less than 35% of all challenges were in the Third Circuit. *See* Cornerstone Research, *Securities Class Action Filings: 2018 Year in Review* (Jan. 30, 2019) at 14,https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2018-Year-in-Review. This mismatch reflects a distinct pivot to courts in the Ninth Circuit. In the three-year period from 2012 through 2014, only two "merger objection" suits were filed annually in district courts in that circuit; only eight cases were filed there in 2015. *Id.* However, in 2016, 25 such cases were filed in district courts in the Ninth Circuit, a figure which increased to 41 cases in 2017. *Id.* Thirty-three cases were filed in the Ninth Circuit in 2018. *Id.*

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[8] *Annual Report Statistics*, Del. Division of Corps., https://corp.delaware.gov/stats/ (last visited Feb. 26, 2019).

The shift in where plaintiffs file their suits even within the federal court system demonstrates that the plaintiffs' bar reacts to the perceived friendliness of courts to their "merger objection" suits. If this Court adopts the Ninth Circuit's negligence standard, plaintiffs will almost certainly abandon state court litigation and instead file nearly all "merger objection" cases in federal courts.

* * *

In the event the Court upholds the existence of an implied private right of action under § 14(e), the Court should adopt a scienter standard because negligence will burden the federal court system with an increasing number of frivolous "merger objection" cases that the plaintiffs-side class action bar continues to file without any concomitant benefit to corporations and society.

III. OTHER POLICY CONSIDERATIONS STRONGLY FAVOR A SCIENTER STANDARD FOR § 14(e) CLAIMS.

A. A Negligence Standard for § 14(e) Increases the Risk of Over-Disclosure.

In addition to inviting more "merger objection" cases into federal courts, a negligence standard for § 14(e) will change the type and volume of disclosures corporations make in connection with tender offers. The Exchange Act was intended to increase disclosure from companies to investors, "arming investors with information" in order to improve market efficiency, curb corporate abuse, limit insider trading, and reduce the need for government intervention. Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 Wash. U.

L.Q. 417, 418 (2003); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976); Thomas L. Hazen, *Treatise on the Law of Securities Regulation* § 1:16 (7th ed. 2017). Section 14(e), enacted in 1968 as part of the Williams Act (amending the Exchange Act), serves this goal as well. *See* Pub. L. No. 90-439, 82 Stat. 455; *see also Schreiber*, 472 U.S. at 11 ("Nowhere in the legislative history is there the slightest suggestion that § 14(e) serves any purpose other than disclosure . . . .").

The Exchange Act and the Williams Act amendments, of course, do not require disclosure to shareholders of every fact. Rather, the statute and this Court have required disclosure of only material information. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448 (1976). In the tender offer context, federal courts find "a misstatement or omission [to be] 'material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding' whether to accept the tender offer." *Seaboard World Airlines v. Tiger Int'l, Inc.*, 600 F.2d 355, 361 (2d Cir. 1979) (quoting *Prudent Real Estate Tr. v. Johncamp Realty, Inc.*, 599 F.2d 1140, 1146 (2d Cir. 1979) (Friendly, J.)) (additional quotation marks omitted); *accord In re Digital Island Sec. Litig.*, 357 F.3d at 328. This is essentially the same standard that this Court announced in *TSC Industries*, and which federal courts apply to § 10(b) cases. *TSC Indus.*, 426 U.S. at 448.

In recent years, however, attempts to comply with these disclosure requirements in the context of an aggressive litigation environment have created a risk of "over-disclosure," as management teams are

incentivized to "bury shareholders in an avalanche of trivial information,"[9] in order to minimize risk and "avoid liability." *In re Goodyear Tire & Rubber Co. Sec. Litig.*, 1993 WL 130381, at *6. This practice of over-disclosure is not "conducive to informed decision-making." *TSC Indus.*, 426 U.S. at 448-49. Over-disclosure causes companies to waste resources by disclosing immaterial information, which in turn causes investors to waste their time, money, and effort attempting to distill the material from the immaterial in disclosure documents that are often hundreds of pages long. *See* Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 Ala. L. Rev. 473, 507 (2007).

A negligence standard encourages over-disclosure. Instead of making judgments to ensure that no material misstatements or omissions appear in the documents, companies will have every reason to attempt to avoid liability under a negligence standard by erring in favor of over-inclusive disclosures. A negligence standard thus upsets the balance struck by this Court's jurisprudence, which seeks to ensure that shareholders obtain material information without being drowned in a sea of mundane, immaterial details.

This Court has recognized the danger of over-disclosure. *See TSC Indus.*, 426 U.S. at 448 ("Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good.").[10] Here, a negligence standard

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[9] *TSC Indus.*, 426 U.S. at 448.

[10] Delaware courts, too, have cautioned against over-disclosure. *See In re Micromet Inc. S'holders Litig.*, C.A. No.

tips the materiality bar too far in one direction – the wrong direction – and invites management to make voluminous tender offer documents even longer, without providing any additional material information to shareholders. If a negligence standard is adopted, the issue of over-disclosure is likely to affect all future tender offers.

B. A Negligence Standard for § 14(e) Violations Will Chill Tender Offers.

As noted above, § 14(e) was added to the Exchange Act as part of the amendments contained in the Williams Act, enacted in 1968. In the 1960s, tender offers grew in popularity and were not otherwise regulated by the SEC. S. Rep. No. 90-550, at 2 (1967) (noting that "[t]he cash tender offer has become an increasingly favored method of acquiring control of publicly held corporations"). While Congress sought to regulate tender offers through the Williams Act amendments to the Exchange Act in order to avoid potential abuses, *id.* at 2-3, its intent was to avoid discouraging tender offers

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7197-VCP, 2012 WL 681785, at *11 (Del. Ch. Feb. 29, 2012) ("The duty to disclose is not a mandate for prolixity. Instead, balanced against the requirement of complete disclosure is the pragmatic consideration that creating a lenient standard for materiality poses the risk that the corporation will bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to informed decision-making.") (internal citations, quotation marks, and alterations omitted); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994) ("Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information.").

because it viewed them as useful in providing a check on inefficient management:

> It was strongly urged during the hearings that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management. It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company. The committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The bill is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.

Id. at 2-4.

Tender offers continue to prove beneficial to the market today. Originally, tender offers were often used in connection with a hostile takeover or to circumvent a board of directors that was unwilling to entertain a merger offer. In the late 1980s, the SEC enacted the "Best Price Rule," which required, among other things, that all shareholders, whether owning a single share or owning a large block, were paid the same price. *See* 17 C.F.R. § 240.14d-10 (2019). This made tender offers fairer and nearly eliminated their use in hostile takeovers.

Today, companies seeking a business combination may prefer tender offers for a variety of reasons. For example, tender offers are often faster to complete than mergers due to less onerous public filing

requirements, faster antitrust review, and SEC rules requiring a bidder to pay for shares within three days, or else return those shares to the shareholders. *See* David Offenberg & Christo Pirinsky, *How Do Acquirers Choose between Mergers and Tender Offers?*, 116 J. Fin. Econ. 331, 340-42 (2015). Based on empirical analysis, tender offers are often complete one to two months faster than mergers. *See id.* at 340.

Tender offers also can be more beneficial than mergers for shareholders. As noted above, shareholders are paid quickly for their shares due to SEC requirements that funding for a tender offer be in place before the tender offer begins and that shareholders be paid (or have their shares returned) within three days of the close of the tender offer. *See id.* at 33; *see also* 17 C.F.R. § 240.14d-1(c) (2019); 17 C.F.R. § 240.14e-8(c) (2019). In addition, tender offers are associated with higher premiums than mergers. *See* Offenberg & Pirinsky, *supra*, at 342-43.

Imposing a negligence standard for violations of § 14(e) risks chilling tender offer activity. Parties interested in a tender offer transaction in order to capture the numerous benefits, including those discussed above, may be deterred from pursuing a tender offer if they will be liable to potential shareholders based on mere negligence.[11] As a

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[11] This key difference between tender offers and mergers – that tender offers often involve representations by third parties to shareholders whereas mergers involve representations by management to shareholders – provides one possible reason for adopting a higher standard for § 14(e) violations than for § 14(a) violations. Note, however, that while several lower courts have

result, shareholders will lose a meaningful check on inefficient but entrenched management, and corporations will lose an efficient way to effect a business transaction.

C. A Negligence Standard for § 14(e) Undercuts Settled Mergers and Acquisitions Law.

The adoption of a negligence standard adversely affects financial institutions participating in merger activity. Financial institutions are often involved in merger activity as advisors. In most mergers, the seller obtains a "fairness opinion" from a financial advisor, which provides the financial advisor's view on whether the price terms of the merger – usually the per share price to be received by the seller's shareholders – are fair.

As the facts of this case illustrate, shareholders often challenge the financial advisor's analyses. *See* Pet. App. at 4a-5a. Respondent Varjabedian challenged, among other things, the Recommendation Statement's failure to summarize Goldman Sachs' Premium Analysis conducted in connection with the Avago-Emulex merger. Pet. App. 5a-6a.

Under Delaware law, a seller must disclose only a "fair summary" of the fairness opinion. *See, e.g.*, *Dent v. Ramtron Int'l Corp.*, C.A. No. 7950-VCP,

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adopted a negligence standard for § 14(a) claims, this Court has twice declined to decide the issue and the Sixth Circuit has affirmatively held that scienter is required. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); *see also, e.g.*, *Adams*, 623 F.2d at 423 & n.2.

2014 WL 2931180, at *12 (Del. Ch. June 30, 2014). Stockholder plaintiffs, however, routinely bring "merger objection" cases premised on the notion that merger parties failed to disclose every conceivable detail regarding the financial advisor's fairness opinion. Although Delaware courts have long rejected these claims as a matter of state law,[12] negligence-based § 14(e) claims give plaintiffs the potential opportunity to do what Delaware has prohibited – nitpick the details and assumptions underlying financial analyses.

Moreover, the lower standard may entice stockholder plaintiffs to allege § 14(e) claims directly against financial advisors. Plaintiffs sometimes allege aiding and abetting claims against a financial advisor, but such claims often fail (or are not made) because they require scienter. *See, e.g.*, *In re Zale Corp. Stockholders Litig.*, C.A. No. 9388-VCP, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015) (dismissing aiding and abetting claim against financial advisor Merrill Lynch); *Malpiede v. Townson*, 780 A.2d 1075, 1098 (Del. Ch. 2001) ("[P]laintiffs' aiding and abetting claim fails as a matter of law because the allegations in the complaint do not support an

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[12] *See, e.g.*, *Dent*, 2014 WL 2931180, at *13 ("This is simply a 'tell me more' request that, unlike a viable disclosure claim, fails to identify how the analysis is misleading or incomplete if it does not disclose specifically which publicly available sources of information Needham used to do its work."); *In re 3Com S'holders Litig.*, Civil Action No. 5067-CC, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009) ("There are limitless opportunities for disagreement . . . . Considering this reality, quibbles with a financial advisor's work simply cannot be the basis of a disclosure claim.").

inference that [defendant] knowingly participated . . . ."); *Lee v. Pincus*, C.A. No. 8458-CB, 2014 WL 6066108, at *13 (Del. Ch. Nov. 14, 2014) ("To demonstrate the 'knowing participation' element of an aiding and abetting claim, it must be reasonably conceivable from the well-pled allegations that 'the third party act[ed] with . . . knowledge . . . .' Knowing participation has been described as a 'stringent' standard that 'turn[s] on proof of scienter.'") (alterations in original; internal citations omitted).

A negligence standard opens the door to claims that would have failed under Delaware law, as plaintiffs need only allege negligence, not scienter, to assert § 14(e) claims directly against financial advisors. This Court has long rejected aiding and abetting claims for violations of the securities laws.[13] *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008) (holding the reforms of the PSLRA do not permit private aiding

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[13] This Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), requires that a defendant be the "maker" of a statement in order to be the target of a federal securities claim. *Janus* and its progeny bar § 14(e) claims against financial advisors and other third parties. The transition of "merger objection" litigation to federal court is a relatively new, post-*Trulia* phenomenon, however, and it will take time to § 14(e) case law to catch up with more settled § 10(b) law. Further, at least one court – the United States District Court for the Northern District of California – has found that alleged misrepresentations in a recommendation statement that relate to a fairness opinion are attributable to the financial advisor. *See Biotechnology Value Fund, L.P. v. Celera Corp.*, No. C 13-03248 WHA, 2014 WL 988913, at *3-4 (N.D. Cal. Mar. 10, 2014).

and abetting claims under § 10(b)); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 183 (1994) (holding that private plaintiffs cannot maintain aiding and abetting claims under § 10(b)). The adoption of a negligence standard conflicts with this Court's jurisprudence, which establishes that there should be no private civil aiding and abetting liability under the securities laws. For that reason, this Court should reverse the Ninth Circuit's erroneous decision and adopt a scienter standard for § 14(e) claims.

CONCLUSION

For the reasons discussed above, this Court should reverse the Ninth Circuit's opinion and adopt a scienter standard for violations of § 14(e).

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No. 18-459

In The
Supreme Court of the United States

EMULEX CORPORATION, ET AL.,
Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 States.[1] Founded in 1977, WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law.

To that end, WLF often appears before this and other federal courts in cases raising the proper scope of the federal securities laws. *See e.g., China Agritech, Inc. v. Michael Resh*, 138 S.Ct. 1800 (2018); *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017). Likewise, WLF's Legal Studies Division has published many articles on the faithful interpretation of the federal securities laws and related topics. See, e.g., Doug Green, *et al., Private Securities Litigation: Making the 1995 Reform Act's "Safe Harbor" Safer*, WLF Working Paper (Nov. 16, 2018).

WLF is concerned that the Ninth Circuit's outlier holding—that claims under Section 14(e) require a stockholder to prove only ordinary negligence, not scienter—threatens to impose massive liability on companies for conduct that Congress never intended the Exchange Act to cover. Such unfounded liability is not only contrary to the text, structure, and purpose of the statute, but it would impose a significant drag on the U.S.

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[1] Under Rule 37.6, the undersigned states that no counsel for either party authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Under Rule 37.3(a), all parties consent to the filing of WLF's brief.

economy. WLF has no direct interest, financial or otherwise, in the outcome of this lawsuit. Because of its lack of direct interest, WLF believes that it can assist the Court by providing a perspective distinct from that of any party.

SUMMARY OF ARGUMENT

Congress intended that a uniform scienter standard apply to private rights of action under Section 14 of the Securities Exchange Act of 1934 ("Exchange Act"), whether those actions arise from alleged misstatements or omissions as part of tender offers (Section 14(e)) or proxy solicitations (Section 14(a)). That is the only appropriate way to interpret Section 14 under this Court's analysis in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), especially given that a tender offer and a proxy solicitation are two possible ways of achieving the same transaction (*i.e.*, a change in corporate control).

The U.S. appellate courts are sharply divided over the appropriate mental state for Section 14 claims. The Ninth Circuit requires negligence for claims brought under Sections 14(e) and 14(a), while the Sixth Circuit requires scienter for both. None of the other circuits have applied a uniform standard: the Second and Third Circuits apply scienter for 14(e) but negligence for 14(a), and the remaining circuits have addressed either one provision or the other, or neither.

In their brief opposing certiorari, Respondents correctly argued for a uniform standard of liability for Section 14 claims and cited the seminal case of *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422 (6th Cir.), *cert. denied sub. nom., Adams v. Peat,*

Marwick, Mitchell & Co., 101 S.Ct. 795 (1980) (*see* Cert. Opp. at 24). What Respondents glossed over, however, is that in *Adams* the Sixth Circuit found that *scienter* (*i.e.*, fraudulent intent) is the required mental state for *all* Section 14 claims. This Court should do the same.

Given the significant and increasing volume of Section 14 cases, the situation loudly "call[s] for an exercise of [the Supreme] Court's supervisory power" to resolve the existing disarray in the lower courts. S. Ct. R. 10(a). The legislative histories of Section 14(e) and Section 14(a) and the goals of the overall statutory scheme make clear that scienter should be the uniform mental-state standard covering both claims. Moreover, applying a uniform scienter standard would strengthen Congress's statutory protections against abusive shareholder strike suits.

ARGUMENT

I. An Analysis of the Applicable Mental State for Section 14 Claims Must Analyze the Statutory Framework As A Whole.

To determine the applicable mental-state standard for a private right of action, the Court's analysis would normally begin with the statutory language. Section 14 as a whole, however, lacks language providing for a private right of action. Nor does the statutory language articulate a mental-state standard for any type of claim. Fortunately, the Court has analyzed similar questions in the past, and can apply the same analysis to the question here. In *Ernst & Ernst*, the Court established a framework for determining the requisite state of

mind for implied private actions under federal securities laws when the statute lacks express language on the issue. 425 U.S. at 185.

Ernst & Ernst addressed whether a private right of action brought under Section 10(b), and Securities and Exchange Commission (SEC) Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder, could lie without any allegation of scienter. Although it noted that the language of Section 10(b) "clearly connotes intentional misconduct[,]" the Court did not base its conclusion on only the statutory language. *Ernst & Ernst*, 425 U.S. at 200-01.[2] The Court also analyzed both the legislative history of the Exchange Act "to ascertain whether there is support" for the parties intended interpretations (*id.* at 201), as well as "[t]he structure of the Acts" (*id.* at 207-211). The Court found that Congress's intent, as examined through the legislative history and the federal securities laws was to proscribe intentional conduct. *Ernst & Ernst*, 425 U.S. at 201-12.

Ernst & Ernst therefore requires an analysis to ensure that the prohibited conduct is limited to what Congress intended both through the individual statute and the overall statutory scheme, including the "related sections of the Acts." *Id.* at 214. The

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[2] *Ernst & Ernst*'s analysis of the legislative history and structure of the securities laws shows that the Ninth Circuit panel was wrong to conclude that the scienter requirement under Rule 10b-5 hinges solely on the limitations of the authorizing language of Section 10. *See* Pet. App. 1a, 9a.

Court recognized that the lack of statutory language explicitly setting forth a standard of willful, knowing, or purposeful conduct must *not* be construed, without more, as requiring merely negligent action or inaction. In other words, a narrow focus on whether the language in the statute tracks a similar section of the federal securities laws or regulations promulgated thereunder by the SEC, or contains "evil sounding language," is inadequate.

Instead, any reasonable statutory interpretation "must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Util. Air. Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Indeed, an ambiguous statutory provision "is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id. (*citing *United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). This further shows that "the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen." *Ernst & Ernst*, 425 U.S. at 207 (citing *SEC v. Nat'l Sec. Inc.*, 393 U.S. 453, 466 (1969)).

The Court's analysis of Section 14(e), therefore, must also examine the overall purpose, framework, and function of Section 14 as a whole, including the closely related Section 14(a). As explained below, a coherent interpretation of both

will obviate the existing lower-court divisions and disparate standards that brought this case to the Court.

II. The Circuit Courts Are Split on the Mental-State Standard for Section 14 Claims.

As part of its analysis of the federal securities laws, the Court has recognized that they are structured topically.[3] The provisions of Section 14 of the Exchange Act broadly govern, and give the SEC the power to regulate, proxies. Proxies are one way of "obtaining [shareholder] authorization for corporate action" such as the purchase or sale of stock. *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964), *abrogated on other grounds by Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017).

The different circumstances surrounding the passage of Section 14(e) and Section 14(a) help clarify their judicial development. Section 14(a) is an original provision of the Exchange Act, passed in 1934, designed to prohibit abuses prevalent in the 1920s involving the solicitation of shareholder votes. Congress gave the SEC broad power to adopt rules to regulate proxy solicitations, and the SEC later codified SEC Rule 14a-9, 17 C.F.R. § 240.14a-9,

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[3] *See Ernst & Ernst*, 425 U.S. at 207 (noting that Section 9 of the Exchange Act, through each of its individual provisions, "generally proscribes manipulation of securities prices" and that Section 11 of the Securities Act of 1933 ("Securities Act"), through each of its provisions, governs the material set forth in a registration statement).

which prohibits material misstatements or omissions in proxy statements.

Section 14(e), in contrast, was not drafted until 1968, when Congress amended the Exchange Act to regulate tender offers. Part of the Williams Act, the amendments addressed the growth in the 1960s of tender offers–*i.e.*, a public offer, sometimes by a hostile entity, to buy shares of a public company at a certain price within a certain time. Section 14(e) was modeled after SEC Rule 10b-5, which broadly prohibits fraud based on material misstatements or omissions made in connection with the purchase or sale of securities.

Despite the over thirty-year gap between the passage of Section 14(a) and Section 14(e), the two provisions are closely related. Section 14(a) and Section 14(e) address two ways of effectuating the *same* potential transaction (*i.e.* change in corporate control by proxy solicitation or by tender offer). While neither provision contains an express mental-state requirement, a private action brought under either provision *should* be subject to the *same* standard.

Even so, the federal appellate courts have widely diverged on the applicable mental-state standard for Section 14(a) and 14(e) claims. As to Section 14(e), five circuits have concluded that scienter is required.[4] Most of those circuits–the

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[4] *See Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 362-63 (2d Cir.), *cert denied*, 414 U.S. 910 (1973); *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207-08 (5th Cir.), *cert denied*,

Second, Third, and Fifth—have based their conclusions largely on the similarities between SEC Rule 10b-5 and Section 14(e).[5] Below, however, the Ninth Circuit "part[ed] ways from [its] colleagues in [these] five other circuits" by holding that "only negligence, not scienter" suffices for a claim under Section 14(e). Pet. App. 1a.[6]

The Ninth Circuit's decision, however, is not the only disparity among the federal appellate courts on Section 14 mental-state standards. The circuits have also reached varying conclusions about the applicable mental state for Section 14(a) claims, though the circuit split between negligence and scienter tilts the other way. As to Section 14(a), most circuits have concluded that negligence is the

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558 U.S. 873 (2009); *In re Dig. Island Sec. Litig.*, 357 F.3d 322, 328 (3rd Cir. 2004); *Adams*, 623 F.2d 422, 431 (6th Cir. 1980); *SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004).

[5] *See Chris-Craft*, 480 F.2d at 363 ("the underlying proscription of §14(e) is virtually identical to . . . Rule 10b-5"); *Flaherty*, 565 F.3d at 207 ("elements of a claim under Section 14(e) . . . are identical to the Section 10(b)/Rule 10b-5 elements" including the scienter standard); *Dig. Island*, 357 F.3d at 328 ("Section 14(e) is 'modeled on the antifraud provisions of §10(b) of the ['34] Act and Rule 10b-5'" (quoting *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10 (1985) (alteration in original)).

[6] WLF agrees with Petitioners that the Ninth Circuit's decision cannot stand for the further reason that no basis exists for inferring any private right of action under Section 14(e).

appropriate standard.[7] These decisions are based largely on the fact that Section 14(a) does not contain "evil sounding language" indicative of Congress's desire to address only fraud.[8]

In contrast, the Sixth Circuit—expressly applying the *Ernst & Ernst* analysis–has authored the leading decision holding that scienter is the required mental state for claims brought under Section 14(a) and Rule 14a-9. *See Adams*, 623 F.2d at 422. After an exhaustive review of the legislative

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[7] *See Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299-1300 (2d Cir. 1973); *Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 761, 777 (3d Cir. 1976); *Dasho v. Susquehanna Corp.*, 461 F.2d 11, 29-30 n.45 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972); *Knollenberg v. Harmonic, Inc.*, 152 F. App'x 674, 682-83 (9th Cir. 2005). A number of these cases were decided before *Ernst & Ernst*, and none of them apply the analytical framework set forth in that decision. Indeed, in *Dasho*, the Seventh Circuit concluded that the mental-state standard for Section 14(a) should be the same as the standard for claims under Section 10(b) and Rule 10b-5. 461 F.2d at 29-30 n.45. Yet, at that time (before *Ernst & Ernst*), the applicable mental-state standard for claims under Section 10(b) and Rule 10b-5 in the Seventh Circuit was negligence. *See Kohler v. Kohler Co.*, 319 F.2d 634, 637 (7th Cir. 1963) ("It is clear from the examination that [Section 10(b)] was meant to cover more than deliberately and dishonestly misrepresenting or omitting facts which ordinarily are badges of fraud and deceit.") (citations omitted).

[8] *See Gerstle*, 478 F.3d at 1299; *Knollenberg*, 152 F. App'x at 674.

history of Section 14(a) and related statutory provisions, including Section 14(e), the court held that "Section 14(a) requires proof of scienter" insofar as accountants' liability is concerned. *Id.* at 429-31. Only accountant liability was before the court at that time, but the Sixth Circuit, in *dicta*, later expanded that holding to include liability for other defendants as well. See *Indiana State Dist. Counsel of Laborers Dist. & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 719 F.3d 498, 507 n.3 (6th Cir. 2013), *vacated on other grounds*, 135 S.Ct. 1318 (2015); *see also SEC v. Shanahan*, 646 F.3d 536, 546 (8th Cir. 2011) (14(a) requires proof of scienter, "at least as to outside directors and accountants").

To recap, left to their own devices the appellate courts have failed to reach consensus as to the mental-state standards for Section 14(e) and Section 14(a) claims, with wide discrepancies. The Ninth Circuit requires negligence for claims brought under Sections 14(e) and 14(a), while the Sixth Circuit requires scienter for both. None of the other circuits have applied a uniform standard: the Second and Third Circuits apply scienter for 14(e) but negligence for 14(a), and the remaining circuits have addressed either one provision or the other, or neither.

III. A Uniform Scienter Standard Should Apply to All Section 14 Private Rights of Action.

This case presents an opportunity to resolve the disarray in the Section 14 jurisprudence. Because the statutory language does not provide for

a clear mental-state standard, the Court should conduct an *Ernst & Ernst* analysis of the legislative history of Section 14 and its place in the overall statutory scheme.[9] The results of this analysis counsel strongly in favor of finding a uniform scienter standard for all Section 14 private rights of action.

First, the full legislative history of Section 14 shows that Congress wanted to prevent intentional and fraudulent misconduct. Congress drafted Section 14(a) first, and it repeatedly used scienter-implying words, such as stating that the purpose of Section 14(a) was to, among other things, "protect investors from . . . *unscrupulous* corporate officials seeking to retain control of management by *concealing* and *distorting* facts." S. Comm. on Banking & Currency, S. Rep. No. 1455, 73d Cong., 77 (1934) (Section 14(a)) (emphases added). The acts of concealment and distortion connote intentionality, not merely negligent conduct.[10] And in support of

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[9] The statutory construction of Section 14 cannot begin and end with the plain words of Section 14. Because neither 14(a) nor 14(e) refers to a state-of-mind requirement at all, a literal construction would be that Section 14 is a strict liability statute. Even Respondents do not advocate for that position. Respondents must therefore concede that, even to assess if negligence is the applicable standard, a court must look beyond the plain words of Section 14 in conformity with this Court's decision in *Ernst & Ernst*.

[10] *See* Merriam-Webster's Collegiate Dictionary, 1051 (10th Ed. 1993) (defining "scrupulous" as "having moral integrity"); *id.* at 238 (defining "conceal" as "to prevent disclosure or recognition"); *id.* at 338 (defining "distort" as "to twist out of the true meaning or proportion").

Section 14, Representative Dirksen expressed concern about the abusive solicitation of "proxies and the use of such proxies for *manipulation*."[11] This Court has recognized that the word "manipulation" is a "term of art when used in connection with securities markets [that] connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Ernst & Ernst*, 425 U.S. at 199.

The legislative history also contains an example of the type of conduct Congress intended Section 14(a) to prohibit, and that example evidences scienter. Congress criticized a proxy that sought shareholder approval of a deal "organized by two dummies of the president of the board" and noted that the "very officers and directors who were betraying" the stockholder stood to gain "substantial profits" from the deal.[12] In other words, "the sort of proxy abuse that Congress was trying to stop [was] that of corporate officers using the proxy mechanism to *ratify their own frauds* upon the shareholders . . . ." *Adams*, 623 F.2d at 429; *see also Borak*, 377 U.S. at 431-32 (purpose of Section 14(a) is to protect investors "from the *deceit* practiced on the stockholders as a group.") (emphases added). Precedent in this Court shows that Congress's efforts

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[11] 78 Cong. Rec. 7961 (1934) (statement of Rep. Dirksen) (emphasis added).

[12] S. Comm. on Banking & Currency, S. Rep. No. 1455, 73d Cong., at 77; *see also Adams*, 623 F.2d at 430 (describing other parts of Congressional record and concluding that the "common denominator of all these depictions of the problem is wrongdoing with some degree of knowledge, *i.e.* scienter").

to proscribe practices undertaken "other than in good faith" support a scienter, rather than a negligence standard. *See Ernst & Ernst*, 425 U.S. at 205-06 (pointing to "specific practices" listed in legislative history "where the defendant has not acted in good faith" as supportive of scienter standard for 10(b) claims).[13]

In contrast there is no mention of negligence anywhere in the legislative history of Section 14(a). *See Adams*, 623 F.2d at 430 (analyzing Section 14(a)'s legislative history and concluding that "nowhere, not in the committee reports nor in the House or Senate debates, does it appear that Congress desired to protect the investor against negligence of accountants as well"). This absence weighs heavily in favor of applying a scienter standard. *See Ernst & Ernst*, 425 U.S. at 206 (finding scienter applies because legislative history did not "indicat[e] that Congress intended anyone to be made liable for such practices unless he acted other than in good faith").

The legislative history of Section 14(e), drafted more than 30 years later, contains similar references to scienter-based acts, but again no discussion of negligence. The Court has recognized in other decisions that Section 14(e) was "modeled on the anti-fraud provisions of Section 10(b) of the Act and Rule 10b-5," *Schreiber*, 472 U.S. at 10, and "prohibits fraudulent acts in connection with a tender offer." *United States v. O'Hagan*, 521 U.S. 642, 667 (1997).

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[13] *See also Adams*, 623 F.2d at 429 ("[T]he nature of each wrong deed depicted by the [Senate report to the Exchange Act] evidenced scienter.").

The legislative history reveals that Congress focused on the "*integrity* of a company's management" and preventing "secrecy in th[e] area" of tender offers. H.R. Rep. 90-1711 (1968) (emphasis added); *see also* S. Rep. 90-550 (1967).[14] Further, the drafters of the Williams Act titled the statutory language that now comprises Section 14(e) "Subsection(e) - Fraudulent transactions." S. Rep. 90-550 (1967) at 10. And as with Section 14(a), Section 14(e)'s legislative history shows no concerns about diligence, reasonable care, or other failings that could support a lesser negligence standard.

Based on its review of these legislative histories, the Sixth Circuit concluded that "14(a) and 14(e) should be governed by the same standard of liability . . . and that an action under 14(a) requires proof of scienter." *Adams*, 623 F.2d at 431.[15] The Sixth Circuit's well-reasoned analysis should inform the Court's review under the *Ernst & Ernst* framework here as well.

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[14] The statutory language of Section 14(e) also refers to "fraudulent, deceptive, or manipulative acts," which support a scienter standard for the reasons described by Petitioners in more detail. *See* Pet.'s Br. at 25-29.

[15] As noted, *supra*, only accountant liability was before the court at that time, but the Sixth Circuit, in *dicta*, later expanded that holding to include liability for other defendants as well. *See Omnicare, Inc.*, 719 F.3d at 507 n.3 ("14(a) does in fact require proof of scienter."). No basis exists for determining that Congress intended, in Section 14 claims, to create a *different* mental-state standard for *different* types of defendants.

Second, the role of Section 14(e) within the statutory structure supports a scienter standard. Congress elected to place later-drafted Section 14(e) in the same section as 14(a). This is a logical choice given that tender offers and proxy solicitations are both possible ways to implement the same transaction. *See* S. Rep. 90-550 (applying existing regulations for proxy contests to cash tender offers because "the cash tender offer is similar to a proxy contest").[16] If Congress intended for Section 14(e) to be governed by a different standard than Section 14(a), it would have explicitly said so. *See Hall v. Hall*, 138 S.Ct. 1118, 1129 (2018) ("Congress does not alter the fundamental details of an existing statutory scheme with 'vague terms' and 'subtle devices'[.]" (quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). The obvious inference is that Congress intended both Section 14(a) and Section 14(e) to be governed by the same standards. To hold otherwise, as the Sixth Circuit has recognized, would mean that "some misleading [investor communications,] which would trigger liability if shaped in the form of one transaction, would be immune if shaped as the other, or vice versa." *Adams*, 623 F.2d at 421. The better interpretation is that "Congress expressed the desire

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[16] *See also Adams*, 623 F.3d at 430 ("[T]ender offers and proxy solicitations are two alternative methods of achieving the same result, corporate control; and Congress perceived that both were subject to the same type of abuse. It therefore acted to eliminate an existing loophole in the old law so that wrongful usurpation of control would not escape securities regulation whenever one combatant chooses to seize control by tender offer rather than by proxy fight.")

that proxy statements and tender offers be governed by the same rules and regulations[, which] would logically extend to standards of liability." *Id.* at 430-31.

What's more, where the securities laws allow for recovery for merely negligent conduct, Congress created "significant procedural restrictions" that protect against concerns the statutes would be misused. *See* Pet.'s Br. at 31-34; *Ernst & Ernst*, 425 U.S. at 209-210 (noting that plaintiffs are required to post bond for costs and the restrictive statute of limitations under Sections 11, 12(2) or 15 of the Securities Act). There is good reason for this–a negligence standard creates liability for conduct even if the violator does not intend to violate the law. Procedural restrictions, such as the statutory reasonable-belief defense for Section 11 claims, are one way that Congress limited the undue expansion of the threat of liability under a negligence standard. *See* 15 U.S.C. §77k(b)(3).[17] The lack of any procedural restrictions in Section 14 is yet another

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[17] If Respondents argue that *Aaron v. SEC*, 466 U.S. 680 (1980) supports their desired result, that opinion's analysis of Section 17(a)(2) of the Securities Act does not apply to the provisions of Section 14 of the Exchange Act, which have their own distinct legislative histories. *See* Pet.'s Br. at 37-39. And the lack of procedural restrictions for private rights of action under Section 14 differs markedly from that of SEC actions under Section 17 because, as *Ernst & Ernst* notes, "Congress regarded [procedural] restrictions on private damage actions as significant . . . [and intended] to deter actions brought solely for their potential settlement value." *Ernst & Ernst*, 425 U.S. at 193, 209 n.30.

structural guidepost that supports a scienter standard. *See Ernst & Ernst*, 425 U.S. at 209 (existence of procedural limitations for the Securities Act claims "indicate that the judicially created private damages remedy under [§] 10(b)[,] which has no comparable restrictions[,] cannot be extended consistent with the intent of Congress, to actions premised on negligent wrongdoing").[18]

IV. A Uniform Scienter Standard Would Best Achieve Congress's Policy Goals.

As this Court has repeatedly stated when examining the scope of inferred private actions under the federal securities laws, it is "proper that we consider . . . what may be described as policy considerations." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975); *see also Landreth Timber Co. v. Landreth*, 471 U.S. 681, 694 n.7 (1985). These policy considerations include Congress's aims in passing the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which limits the ability of plaintiffs to bring meritless private securities suits to extract settlements. *See, e.g., Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 475-78 (2013) (considering impact of PSLRA on class certification issues). Section 14 actions are exactly the type of suits that Congress had in mind.

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[18] A finding that private claims under Section 14 could be brought under a negligence standard would also impair the effectiveness of the procedural restrictions imposed on claims under Section 18 of the Exchange Act. *See* Pet.'s Br. at 34-36.

As the result of recent changes in Delaware law and the aggressiveness of the plaintiffs' bar, nearly every significant merger or acquisition involving public companies is subject to a federal action alleging Section 14 violations (either Section 14(a) or Section 14(e), depending on the nature of the transaction). Indeed, 182 of these actions were filed in 2018 alone, an exponential increase over the historical average. *See* Cornerstone Research, *Securities Class Action Filings: 2018 Year in Review* 2, 5 (2019) (showing a sharp increase in annual federal M&A filings alleging Section 14 claims, from 40 in 2010 to 182 in 2018). These actions usually are resolved at an early stage so as to avoid holding up the transaction, acting as an inefficient "merger tax" that mainly enriches the plaintiffs' bar.

A uniform scienter standard for Section 14 claims would help alleviate this problem. As Congress recognized in crafting the PSLRA, setting the bar too low for securities violations encourages "abusive and meritless suits" and the "targeting of deep pocket defendants . . . who may be covered by insurance, without regard to their actual culpability." H. Rep. 104-369 (1995). On the other hand, limiting claims based on "non-knowing securities law violations" strikes the proper balance between allowing "defrauded investors [to] recover their losses without having to rely upon government action" while also protecting "innocent parties [from being] forced to pay exorbitant 'settlements.'" *Id.*

Requiring proof of scienter for Section 14 claims would strike exactly the right balance–plaintiffs would still be able to bring meritorious

suits, but could not simply make generalized negligence allegations about transaction disclosures and then immediately seek a settlement. And a uniform scienter standard for both Section 14(a) and Section 14(e) claims would avoid the inherent unfairness of subjecting corporations to different liability risk simply based on whether they chose to pursue a transaction through a proxy solicitation or a tender offer.

CONCLUSION

For the above reasons, *Amicus Curiae* Washington Legal Foundation respectfully urges the Court to adopt the well-reasoned analysis in *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422 (6th Cir. 1980) and hold that Section 14 requires proof of scienter to establish any claim brought in an inferred private right of action. In doing so, the Court will resolve two important circuit splits and bring much needed clarity to this area of the federal securities laws.

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